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ADMISSIBILITY IN ROMAN-CANON PROCEDURE: THE EMERGENCE OF THE LAW OF POSITIONS

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INTRODUCTION

1. THE PURPOSE OF THIS DISSERTATION

1.1 The Subject

This dissertation is a historical case study of the circumstances in which norms of evidentiary admissibility have arisen and of the form that those norms have taken within an adversarial,[1] but nonjury procedure. The principal case under examination is the development of the law of positions in twelfth- and thirteenth-century Roman-canon adversarial procedure; I also turn in the last chapter for comparison to the Roman-canon law of witnesses. The principal theme of this dissertation is that principles of evidentiary admissibility first emerged to mitigate the problems caused by shifting a measure of control over examination of parties and witnesses from the adjudicator to the parties themselves, in particular the problems of parties' abusive examination of their opponents and parties' tendency to produce evidence that did not serve the fact finder's informational needs.

Roman-canon procedure refers to a family of procedures[2] that emerged from the revival of Roman law jurisprudence in late eleventh- and twelfth-century central and northern

[1] By "adversarial" I mean a mode of procedure in which two parties engage in a structured contest before a neutral adjudicator and in which those parties have a high degree of control over procedural action. See Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Judicial Process* (New Haven, Conn.: Yale Univ. Press, 1986), 3 ("The adversarial mode of proceeding takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The nonadversarial mode is structured as an official inquiry. Under the first system, the two adversaries take charge of most procedural action; under the second, officials perform most activities.").

[2] The best description of the procedures in English is John H. Baker, ed., *The Oxford History of the Laws of England*, vol. 1, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, by Richard H. Helmholz (Oxford: Oxford Univ. Press, 2004), 317–53, 604–26; see also the account in James A. Brundage, *Medieval Canon Law* (London: Longman, 1995), 120–53. The doctrine of twelfth- and thirteenth-century Roman-canon civil procedure is

Italy and southern France. These procedures were rapidly adopted by secular courts in Italy and southern France and ecclesiastical courts initially in the same area and ultimately throughout the Latin West.[3] The words "Roman" and "canon" allude to the two main stocks of normative sources on which the learned lawyers drew to construct the new procedures. One stock was Roman law, represented by the *Corpus iuris*, a body of sixth-century compilations of Roman juristic writing and imperial legislation. The other was the canon law of the Roman Catholic Church, represented by the *Decretum*, a twelfth-century compendium of earlier ecclesiastical norms, and by normative pronouncements of the medieval popes.[4]

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treated comprehensively in Wiesław Litewski, *Der römisch-kanonische Zivilprozeß nach den älteren* ordines iudiciarii, trans. Leon Głowacki, 2 vols. (Kraków: Wydawnictwo Uniwerstytetu Jagiellońskiego, 1999); the doctrine of the entire period from the twelfth through the beginning of the sixteenth century is covered in Knut Wolfgang Nörr, *Romanisch-kanonisches Prozessrecht: Erkenntnisverfahren erster Instanz* in civilibus (Berlin: Springer, 2012). For a historical overview of Roman-canon civil procedure in English, see R. C. van Caenegem, *History of European Civil Procedure*, International Encyclopedia of Comparative Law, ed. Konrad Zweigert, vol. 16, *Civil Procedure*, ed. Mauro Cappelletti, ch. 2 (Tübingen: J. C. B. Mohr (Paul Siebeck), 1973), 11–23, 32–53. See also Hans Jörg Budischin, *Der gelehrte Zivilprozeß in der Praxis geistlicher Gerichte des 13. und 14. Jahrhunderts im deutschen Raum* (Bonn: Röhrscheid, 1974) (German ecclesiastical practice); Paul Fournier, *Les officialités au Moyen Âge: Étude sur l'organisation, la compétence et la procédure des tribunaux ecclésiastiques ordinaires en France, de 1180 à 1328* (Paris, 1880), 128–281 (France only); Giuseppe Salvioli, *Storia del diritto italiano*, 9th ed. (Turin: Unione tipografico-editrice, 1930), 787–50, 767–82 (Italy only, beginning in the thirteenth century); Giuseppe Salvioli, *Storia della procedura civile e criminale*, vol. 3, pts. 1–2 of *Storia del diritto italiano*, ed. Pasquale Del Giudice (Milan: Hoepli, 1925–27) (Italy only).

[3] Two short accounts in English of this revival, which partly overlapped the formative period of the common law in England, are Stephan Kuttner, "The Revival of Jurisprudence," in *Renaissance and Renewal in the Twelfth Century*, ed. Robert L. Benson and Giles Constable (Cambridge, Mass.: Harvard Univ. Press, 1982), 299–323; Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany*, trans. Tony Weir (Oxford: Clarendon Press, 1995), 28–54. The best synthesis remains Ennio Cortese, *Il diritto nella storia medievale*, vol. 2, *Il basso medioevo* (Rome: Il cigno Galileo Galilei, 1995), 5–143. Literature from after 1995 on the important scholarly debate about the chronology of the revival is collected in Kenneth Pennington, "The 'Big Bang': Roman Law in the Early Twelfth Century," *Rivista internazionale di diritto comune* 18 (2007): 43n3.

[4] See Nörr, *Romanisch-kanonisches Prozessrecht*, 1–2. For simplicity's sake I use the adjective "Roman-canon" instead of the equally common but unwieldier "Roman-canonical"

The process of construction began in the second third of the twelfth century and continued through the thirteenth century. Although gradually transformed by successive political and intellectual developments, Roman-canon procedure lies at the roots of the procedures used in most contemporary civil law jurisdictions.[5] It also provided at least some inspiration for English equity procedure.[6]

By *adversarial* procedure I mean to refer more specifically to a subset of this family of procedures.

The Roman-canon family can be divided into several subfamilies or modes.[7] One mode, conventionally called inquisitorial procedure, is nonadversarial. It encompasses several related forms of criminal procedure[8] in which a judge investigates an offense and proceeds

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or "Romano-canonical." Nörr reasonably prefers the term *romanisch-kanonisch* ("Romano-canonical") on the ground that it can be understood also to embrace the contributions of early medieval Lombard law and the law of the Italian city-states. See id. at 2n3.

[5] For an overview of contemporary procedure in civil law jurisdictions, see John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition*, 3rd ed. (Stanford, Calif.: Stanford Univ. Press, 2007), 112–33. The history of Continental civil procedure in particular is helpfully periodized in Knut Wolfgang Nörr, *Ein geschichtlicher Abriss des kontinentaleuropäischen Zivilprozesses: In ausgewählten Kapiteln* (Tübingen: Mohr Siebeck, 2015).

[6] John H. Baker, ed., *The Oxford History of the Laws of England*, vol. 6, *1483–1558*, by John H. Baker (Oxford: Oxford Univ. Press, 2003), 180.

[7] To avoid unnecessary complication my schematic leaves out the separate, historically less durable modes of procedure *per notorium* and *per denuntiationem*. Procedure *per notorium* was available only for the prosecution of "notorious" or "manifest" crime. Procedure *per denuntiationem* required a private party first to admonish the accused and urge repentence; only if the admonishment failed to persuade the accused could the private party then initiate proceedings by a denunciation to the public authority, which would thereafter proceed ex officio. On these modes see, e.g., Richard M. Fraher, "IV Lateran's Revolution in Criminal Procedure: The Birth of *inquisitio*, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics," in *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*, ed. Rosalio José Castillo Lara (Rome: LAS, 1992), 102–4.

[8] The insight that inquisitorial procedure is best understood as a suite of related variant procedures rather than as a single form of procedure is that of Massimo Vallerani. See Massimo Vallerani, *La giustizia pubblica medievale* (Bologna: Il mulino, 2005), 37, 39; see also Massimo Vallerani, "Modelli di verità: Le prove nei processi inquisitori," in *L'enquête au Moyen Âge*, ed. Claude Gauvard (Rome: École française de Rome, 2008), 123–42.

against an accused ex officio. Inquisitorial procedure was definitively introduced into the procedure of ecclesiastical courts by church legislation proposed by Pope Innocent III and adopted by the Fourth Lateran Council in 1215. Variants of the procedure began to be applied in secular courts soon thereafter, and inquisitorial procedure had already become standard practice in Italian jurisdictions by the mid-thirteenth century.[9] This is the fearsome mode of premodern Continental procedure that is best known to English-language legal scholarship.[10]

There is, however, another, *adversarial* mode of Roman-canon procedure. In this other paradigm, proceedings are initiated by a complainant, not a judge. The complainant brings a claim against a defendant before the judge, who receives the parties' claims, proofs, and arguments passively, without an independent inquiry into the facts, and renders judgment without a jury. This adversarial mode is older than the inquisitorial mode. The earliest systematic doctrinal account of the adversarial mode probably dates to the 1130s, whereas the inquisitorial mode emerged in ecclesiastical courts only after 1215, the better part of a century later. In theory, the adversarial mode also had a broader domain of application because it, unlike inquisitorial procedure, applied to both civil and criminal cases. Indeed, it was for much of the twelfth century the *only* mode of procedure accepted in the doctrine. In practice, inquisitorial procedure partly supplanted the adversarial mode of procedure as an

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[9] See Vallerani, *Giustizia*, 34–45. The form of inquisitorial procedure that was used in the secular courts of the medieval Italian city-states is detailed in the thirteenth-century *Tractatus de maleficiis* of Albertus Gandinus. See Hermann Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik*, vol. 2, *Kritische Ausgabe des "Tractatus de maleficiis" nebst textkritischer Einleitung* (Berlin: Walter de Gruyter, 1926).

[10] Inquisitorial procedure is best known in American legal scholarship through the writing of John Langbein. See John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: Univ. of Chicago Press, 1977); John H. Langbein, "Torture and Plea Bargaining," *University of Chicago Law Review* 46 (1978): 3–22. See also Mirjan R. Damaška, "Hearsay in Cinquecento Italy," in *Studi in onore di Vittorio Denti*, vol. 1, *Storia e metodologia: Garanzie e principi generali* (Milan: CEDAM, 1994), 59–89; Mirjan R. Damaška, "The Quest for Due Process in the Age of Inquisition," *American Journal of Comparative Law* 60 (2012): 919–54.

instrument of crime repression during the thirteenth century.[11] But the adversarial mode remained the sole mode of procedure for civil cases from the twelfth century onward.

Only the adversarial mode of Roman-canon procedure will be studied in this dissertation. In addition, because of the almost exclusive concentration on civil cases in the earliest writing of the jurists on Roman-canon procedure, I will concentrate on civil, rather than criminal, proceedings conducted in this adversarial mode.[12]

Law of positions refers to the body of norms regulating means of proof[13] in Roman-canon procedure called "positions" (Latin *positiones*). Positions were Roman-canon procedure's means of using litigating parties as sources of proof in their own disputes. A position is an assertion of fact that the party bearing the burden of proof puts forward at trial after the parties have joined issue. If the position is admissible, the opposing party ordinarily must answer, under oath, by either affirming the truth of the matter asserted in the position or denying it. An affirmative answer ordinarily is taken to constitute a confession or admission by the respondent and is deemed proof of the matter asserted in the position.

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[11] See, e.g., Vallerani, *Giustizia*, 113–66 (discussing the case of Bologna).

[12] For the rest of the dissertation, when I speak of "Roman-canon procedure" without further elaboration, I will be referring to Roman-canon civil procedure: the adversarial mode of procedure as applied to civil disputes.

[13] Following the standard terminology of civil law procedural systems, I generally use the term "means of proof" (*modes de preuve*, *Beweismittel*, *mezzi di prova*) to refer to the different categories of evidence that can be introduced at trial (witness testimony, written documents, etc.). Cf. Michele Taruffo, *Studi sulla rilevanza della prova* (Milan: Giuffrè, 1970), 113 ("La proof è […] l'obbiettivo a cui tende la parte nel produrre l'evidence e, quando viene raggiunta, ne è una conseguenza."). It can be debated whether positions in fact constituted *probationes* ("proofs") in the most technical sense of the term in Roman-canon procedure, since the jurists sometimes speak of positions as only as standing "in the place of proofs." This terminological debate is not important for our purposes. In any event, affirmative responses to positions ("confessions") were understood by the end of the thirteenth century to be "proofs." See, e.g., *Speculum iuris Gulielmi Durandi* […], vol. 2 (Turin, 1578), pt. 2, rub. *de positionibus*, § 3, at 112rb.

Finally, when I say *twelfth- and thirteenth-century* procedure, I mean more exactly the timespan running from about 1135, the most recent proposed date of the earliest systematic text on Roman-canon procedure,[14] to about 1245, the likely *terminus ante quem* of two monograph treatises on the law of positions on which I focus in chapter 3.[15] These are not hard and fast dates. I occasionally range outside these dates to refer to a particular source of legal practice. I also draw more liberally on sources from the second half of the thirteenth century in chapter 4, where my purpose is to draw a comparison between the law of positions and the separate body of Roman-canon procedural law that governed witness testimony.

As the date range I have just announced should make obvious, this dissertation is by no means a comprehensive treatment of the doctrinal history of the law of positions. The scope of the study could have been extended until past 1245, the year in which Pope Innocent IV issued legislation affecting the law of positions at the First Council of Lyon.[16] It could also have been extended up through 1296, the year of death of William Durant the Elder, author of the most comprehensive and for centuries the most widely used treatment of Roman-canon procedure,[17] or even into the early seventeenth century, when an important and lengthy Italian monograph treatise on the law of positions was published.[18] The narrower

[14] See chapter 1, note 2 and text accompanying notes 1–3.
[15] See appendix.
[16] See VI 2.9.1.
[17] See Johann Friedrich Ritter von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts von Gratian bis auf die Gegenwart*, vol. 2, *Die Geschichte der Quellen und Literatur von Papst Gregor IX. bis zum Concil von Trient* (Stuttgart, 1877), 147. On Durant's text, the *Speculum iudiciale*, see generally Knut Wolfgang Nörr, "À propos du *Speculum iudiciale* de Guillaume Durand," in Iudicium est actus trium personarum*: Beiträge zur Geschichte des Zivilprozeßrechts in Europa* (Goldbach, Ger.: Keip, 1993), ch. 4.
[18] See *Tractatus de positionibus Blasii Michalorii* […] (Venice, 1617). On the author, see Italo Birocchi and Eloisa Mura, "Micalori, Biagio," in *Dizionario biografico degli giuristi italiani (XII–XX secolo)*, ed. Italo Birocchi et al. (Bologna: Il mulino, 2013), 2:1340–41.

choice of dates is determined by my main purpose: to explain the initial appearance of norms of evidentiary admissibility in Roman-canon procedure.

1.2 Contributions to the Scholarly Literature

This dissertation aims to contribute to two bodies of scholarly literature: on the one hand, the literature of Continental legal history; on the other hand, the theory of the law of evidence.

For Continental legal history, on the one hand, this dissertation sheds light on the origins of the procedural technique of positions. This in turn has implications for our understanding of the adversarial mode of Roman-canon procedure.

The law of positions has long held special significance for the study of Roman-canon procedure. Positions are of interest to scholars in part because they are, as one scholar has put it, the one "specific and unmistakable institution of the Romano-canonical trial."[19] But they have been of interest to scholars above all because they help to reveal an important difference of epistemological assumptions between the adversarial mode and the inquisitorial mode of procedure. In the adversarial mode, the parties present two independent, opposed factual narratives. These opposing, party-constructed narratives appear with particular starkness in the parties' exchange of positions and responses, where each party must respond directly to the factual assertions of his or her opponent. At the end of the trial, the adjudicator must choose whichever competing narrative he finds more probable. In the inquisitorial mode, by contrast, the judge constructs a single factual narrative himself. Instead of choosing

[19] Nörr, *Romanisch-kanonisches Prozessrecht*, 116 (speaking of "jener einzigartig-unverwechselbaren Einrichtung des romanisch-kanonischen Prozesses"); see also Alessandro Giuliani, *Il concetto di prova: Contributo alla logica giuridica* (Milan: Giuffrè, 1961), 160–61 (calling positions "il vertice più alto a cui […] si ricollega la scienza processuale europea (ivi compresa quella inglese)").

probabilistically between two competing truths, the judge inexorably pursues *the* truth on his own.[20] Positions, scholars have observed, belong exclusively to the adversarial mode of procedure. For students of Roman-canon procedure, positions are thus perhaps the most salient marker of the "probabilistic" or dialectical model of truth that is typical of the adversarial mode of procedure.[21]

Nonetheless, whatever significance positions hold for historians of Roman-canon procedure, the origins of the concept of the position and its associated legal doctrine remain obscure. Unlike other areas of Roman-canon procedure, for which models in ancient Roman law or in canon law are often readily apparent, positions have no obvious parallels in earlier normative sources.

Several theories have been proposed to dispel this obscurity. One theory holds that positions are a vestigial survival of an earlier, "Germanic" procedural technique that predated the late eleventh- and twelfth-century revival of jurisprudence but was later taken up into the doctrine of the learned lawyers.[22] This theory fits within a broader tradition of scholarship on

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[20] See generally Alessandro Giuliani, "Prova (filosofia)," in *Enciclopedia del diritto* (Milan: Giuffrè, 1988), 37:518–79; see also Knut Wolfgang Nörr, "Über einige Stadien der Historiographie des Prozessrechts," in *Towards a European* ius commune *in Legal Education and Research: Proceedings of the Conference Held at the Occasion of the 20th Anniversary of the Maastricht Faculty of Law*, ed. Michael Faure, Jan Smits, and Hildegard Schneider (Antwerp: Intersentia, 2002), 306–7.

[21] See Giuliani, *Concetto*, 151, 160–61; Vallerani, *Giustizia*, 77–80, 85–87.

[22] See Moritz August von Bethmann-Hollweg, *Der Civilprozeß des gemeinen Rechts in geschichtlicher Entwicklung*, vol. 6, *Der germanisch-romanische Civilprozeß im Mittelalter*, pt. 1 (Bonn, 1874), 45 ("ohne Zweifel aus dem langobardischen Prozeß"); Giuseppe Chiovenda, "Romanesimo e germanesimo nel processo civile," in *Saggi di diritto processuale civile (1894–1937)* (Milan: Giuffrè, 1993), 1:201–2; Heinrich Himstedt, *Die neuen Rechtsgedanken im Zeugenbeweis des oberitalienischen Stadtrechtprozesses des 13. und 14. Jahrhunderts* (Berlin: Rothschild, 1910), 45–46; Knut Wolfgang Nörr, "Päpstliche Dekretalen und römisch-kanonischer Zivilprozeß," in *Studien zur europäischen Rechtsgeschichte*, ed. Walter Wilhelm (Frankfurt am Main: Klostermann, 1972), 57; Ernst Zimmermann, *Der Glaubenseid: Eine rechtsgeschlichtliche Untersuchung* (Marburg, 1863), 185–86. Cf. Robert Wyness Millar, "The Mechanism of Fact-Discovery: A Study in

Roman-canon procedure, dating back to the nineteenth century, in which the development of Roman-canon procedure is viewed as a process of amalgamation of competing Roman and Germanic legal "elements."[23] A priori, a Germanic-origin theory is not implausible. The Lombards ruled a kingdom in northern Italy for more than two centuries, and Lombard law remained influential for centuries afterward, including in the legal scholarship of the twelfth and thirteenth centuries.[24] The political landscape of central and northern Italy in the twelfth century was of course different from that of the centuries before. In response to a near-total collapse of central power in the eleventh century, small, de facto independent city-states, the communes, were gradually taking shape during the twelfth century.[25] But at least some of the legal practices of these new communes imitated those of prior centuries, making a Germanic origin of positions at least theoretically possible.

Another theory, presented by its proponents without elaboration, is that the practice of using positions simply developed spontaneously in twelfth- and early thirteenth-century legal practice or "custom" before being adopted by the learned lawyers.[26]

Comparative Civil Procedure," pt. 1, *Illinois Law Review* 32 (1937): 268–69 (suggesting that the adoption of positions "was probably connected with the shift from orality to documentation in the judicial proceeding. It is possible also that it was influenced by Germanic ideas coming through the Lombard law").

[23] This "elemental" model of the study of medieval law was subjected to devastating critique in Francesco Calasso, "Diritto volgare, diritti romanzi, diritto comune," in *Introduzione al diritto comune* (Milan: Giuffrè, 1951), 207–32.

[24] For a brief orientation on the study of Lombard law among the learned lawyers, see Ennio Cortese, *Il rinascimento giuridico medievale*, 2nd ed. (Rome: Bulzoni, 1996), 50–52 (with literature).

[25] For general discussion of the process of formation of the communes, see most recently Chris Wickham, *Sleepwalking into a New World: The Emergence of Italian City Communes in the Twelfth Century* (Princeton, N.J.: Princeton Univ. Press, 2015).

[26] See Antonio Castellari, "Delle posizioni nella procedura comune italiana," in Friedrich Glück, *Commentario alle Pandette: Tradotto ed arricchito di copiose note e confronti col Codice civile del regno d'Italia*, ed. Filippo Serafini, Pietro Cogliolo, and Carlo Fadda, vol. 11, trans. Antonio Castellari et al. (Milan: Società editrice libraria, 1903), 69; Cortese, *Rinascimento*, 78 ("Si trattava di una figura processuale nata spontaneamente nella prassi

Yet another theory is that the technique of positions was inspired by the reception of Aristotle into the Latin West in the twelfth century, in particular the reception of Aristotle's *Topics*. Book 8 of the *Topics* describes a highly formal method of dialectical argument with strict rules of engagement. According to this theory, the technique of positions resulted from the reception of the idea of dialectical disputation from Aristotle's *Topics* into the existing substrate of twelfth-century legal thought. This substrate was itself already infused with ideas about rhetorical argument drawn from late antique rhetoric and logic and thus especially receptive to Aristotelian influence.[27]

I will argue in this dissertation that none of these theories is fully tenable. The technique of positions was not a survival from Germanic antiquity, nor—at least initially—a loan from Aristotelian philosophy. Nor, I will suggest, did it emerge spontaneously from a period of uncontrolled practical experimentation. Rather, I will argue, the technique of positions was a mechanism deliberately adopted by the courts of certain Italian communes in the second half of the twelfth century as a means of exploiting parties' own knowledge about their disputes. It was a solution to the functional problem of how to get parties to provide probative information about the facts of controversies in which they themselves were involved. I will suggest that the practice may have arisen first in Tuscany, possibly in the courts of Pisa, and then spread elsewhere. Insofar as we can tell from the sources, the technique was adopted quite abruptly, suggesting that positions may not have been the result of a slow development in legal practice, but a conscious choice made by the courts and

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forense […]."). There is a trivial sense in which this theory must be true. Cf. Piero Calamandrei, *Procedure and Democracy*, trans. John Clarke Adams and Helen Adams (New York: New York Univ. Press, 1956), 7 ("The whole history of the legal process, from the *formulae* of Roman law to the *positiones* of common law, […] is in substance the history of the transformation of judicial practice into the law of legal procedure […].").

[27] See Giuliani, *Concetto*, 151–58, 161–73.

lawyers who began using them in the late twelfth century. Moreover, I will suggest that unmistakable intellectual influences from the liberal arts, including from Aristotelianism, are indeed detectible, but only in the thirteenth century, several decades after the technique was first adopted.

This argument in turn has broader consequences, I will suggest, for our understanding of the history of Roman-canon procedure. Continental legal historians have long been aware of the fundamental distinction between the adversarial ("accusatorial") and inquisitorial modes of Roman-canon procedure that took shape after the Fourth Lateran Council of 1215. The rise of the inquisitorial mode especially has long attracted the attention of legal historians.[28] But historians' understanding of the process by which the adversarial, rather than the inquisitorial, mode was refined and sharpened during the same period remains hazy in significant respects. In particular, the increasing "passivization" of the judge in the adversarial mode—the gradual transfer of control over procedural action from the judge to the parties that can be detected in the sources of the late twelfth and early thirteenth centuries—and the adaptations in legal doctrine that judicial passivity precipitated remain relatively poorly understood.[29] My account provides a detailed account of this process in one area of procedure, showing both the transfer of procedural control away from the adjudicator and to the parties and the compensating response in the procedural doctrine.

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[28] The literature is too large even to be referenced on an indicative basis. A still-pertinent study on the origins of inquisitorial procedure that addresses earlier scholarship is Winfried Trusen, "Der Inquisitionsprozeß: Seine historischen Grundlagen und frühen Formen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 74 (1988): 168–230.

[29] A significant counterexample is the now-classic Knut Wolfgang Nörr, *Zur Stellung des Richters im gelehrten Prozeß der Frühzeit:* Iudex secundum allegata non secundum conscientiam iudicat (Munich: Beck, 1967).

For the theory of the law of evidence, on the other hand, this dissertation provides some examples of the kinds of evidentiary norm that can arise in a procedure that is adversarial, but jury-less. In Anglo-American legal scholarship, there is a century-old line of research that attempts to explain the common law rules of evidence either from a diachronic-historical perspective or from a synchronic-analytical perspective. The presence of the jury has always been the primary source of explanation for the rules; however, some scholars of evidence have established other explanatory factors, in particular the adversarial character and temporal concentration of trials in Anglo-American procedure.[30] This line of research has had practical consequences for the law. To give just one example: the belief that the rules of evidence are dependent on the presence of the jury has induced some United States federal courts to abandon the so-called "prejudice rule" in bench trials.[31] But this research also carries risks for legal practice, if for no other reason than that in the absence of a corpus of comparative case studies it is difficult to separate out the different explanatory factors. For example, which rules are justified without a jury, but with a temporally compressed trial? Or without a concentrated trial, but still in an adversarial mode of procedure?

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[30] Explanations relying entirely on the jury include the *Berkeley Peerage Case*, 171 Eng. Rep. 126, 135 (K.B. 1816); James B. Thayer, *A Preliminary Treatise on Evidence at Common Law* (Boston, 1898), 266. Diachronic or synchronic explanations relying at least in part on party control or temporal concentration include Mirjan R. Damaška, *Evidence Law Adrift* (New Haven, Conn.: Yale Univ. Press, 1997) (jury, party control, and temporal concentration); John H. Langbein, "The Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review* 96 (1996): 1201 (jury and party control); Edmund Morgan, "The Jury and the Exclusionary Rules of Evidence," *University of Chicago Law Review* 4 (1937): 247 (party control); Christopher B. Mueller and Laird C. Kirkpatrick, *Evidence Practice under the Rules*, 4th ed. (New York: Wolters Kluwer Law & Business, 2012), 2–3 (jury and temporal concentration); Dale Nance, "The Best Evidence Principle," *Iowa Law Review* 73 (1988): 227, 229, passim (party control).

[31] See, e.g., United States v. Preston, 706 F.3d 1106, 1118 (9th Cir. 2013) ("Rule 403 is inapplicable to bench trials."). Contra *In re* Oil Spill by the Amoco Cadiz off the Coast of France on Mar. 16, 1978, 954 F.2d 1279, 1305 (7th Cir. 1992).

This dissertation aims to provide one such a comparative case study. I will argue that the norms of admissibility that developed in the Roman-canon law of positions, as well as in the Roman-canon law of witnesses, arose mainly to address the problems posed by party control over procedural action. They were motivated neither by the presence of a jury, nor by the temporal compression of trials. I will suggest, moreover, that the norms that arose probably served at least two functions comparable to those served by the Anglo-American rules: exclusion of relevant information or information of low probative value and exclusion of lines of inquiry that posed a risk of unfair prejudice to the responding party. This history of admissibility in Roman-canon procedure is admittedly of little or no consequence for the reform of contemporary law. But it may at least enlarge the corpus of comparative and historical data that scholars of the law evidence have at their disposal when they construct explanatory models for the contemporary rules.

2. SOURCES

2.1 Legal Literature

This dissertation draws on several bodies of primary sources from both legal theory and legal practice that are relatively unfamiliar to English-speaking legal scholars.

In contrast to the medieval English common law, the civil law is a tradition of "a book," or books.[32] Two sets of books are at the core of the tradition.[33] One set comprises texts of Roman law that were compiled in the sixth century during the reign of the Byzantine

[32] F. H. Lawson, *A Common Lawyer Looks at the Civil Law: Five Lectures Delivered at the University of Michigan November 16, 17, 18, 19, and 20, 1953* (Ann Arbor: Univ. of Michigan Law School, 1953), 9 (speaking of the civil law as a product of "custom, a book and reason").

[33] I am using the term "civil law" in the broader sense of the combined tradition of the study of Roman and canon law. The term can also have the narrower meaning of Roman law, or within Roman law, the *ius civile* in particular.

emperor Justinian. We know of these texts as the *Corpus iuris*. Medieval lawyers often also called them simply the *libri legales* ("the law books"). The *Corpus iuris* includes the *Code*, a collection of dispositive legal pronouncements of Roman emperors; the *Digest*, a compendium of excerpts of writing from the classical Roman jurists; the *Institutes*, an isagogic text on Roman law modeled on the second-century *Institutes* of Gaius; and the *Novels*, a collection of imperial enactments from the reign of Justinian.[34] The other set encompasses texts of canon law. The most important of these for our purposes are the *Decretum*, a mid-twelfth-century compilation of earlier ecclesiastical norms,[35] and a number of "decretals" (*litterae decretales*), dispositive legal decisions of popes. The *Liber Extra*, an important collection of decretals containing a large number of papal decisions concerning the law of procedure, was compiled and issued at the order of Gregory IX in 1234.

The twelfth- and thirteenth-century lawyers who studied law at Bologna and other centers of legal learning in Tuscany, northern Italy, and southern France commonly specialized in either one or the other of these sets of books. They were thus either Roman lawyers, also known as legists or civilians, or they were canon lawyers, also known as canonists. In the twelfth century and for the first third of the thirteenth century, the core scholarly activity of these lawyers was the composition of glosses on discrete passages of the normative texts. Roman lawyers from this period are thus often referred to as "glossators."

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[34] In the Middle Ages the texts of the *Corpus iuris* were divided differently, into the *Digestum vetus* ("Old Digest"; Dig. 1.1–24.2), *Infortiatum* (Dig. 24.3–38.17), *Digestum novum* ("New Digest"; Dig. 39.1–50.17), *Codex* (Cod. 1–9), and *Volumen parvum*, the latter comprising the *Tres libri* (Cod. 9–12), *Institutiones* (Justinian's *Institutes*), and texts from the *Novels* assembled in the so-called *Authenticum*, itself divided into nine *collationes*. Peter Weimar, "Die legistische Literatur der Glossatorenzeit," in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 1, *Mittelalter (1100–1500): Die gelehrten Rechte und die Gesetzgebung*, ed. Helmut Coing (Munich: Beck, 1973), 156.

[35] In his study of the *Decretum*, which he determined was composed in two recensions, Anders Winroth dates both recensions to the period between 1139 and 1158. Anders Winroth, *The Making of Gratian's "Decretum"* (Cambridge: Cambridge Univ. Press, 2000), 144.

Other genres of legal literature developed gradually over the course of the twelfth century. Most, although not all, of these genres had their ultimate origins in specialized types of gloss.[36]

Two legal genres will be of particular importance for this dissertation. One is the *ordo iudiciorum* ("order of proceedings") or *ordo iudiciarius* ("procedural order"), a systematic manual of procedure. Because the classical Roman jurists left behind no treatment of the law of procedure considered as a whole, the church in particular had long had a need for texts that presented procedural norms in a more or less systematic, albeit crude, form. One such text, a letter of Pope Gregory I, dates to the sixth century; others were produced during the ninth century. Interest in procedure was given new impetus, however, by the revival of jurisprudence in the late eleventh and twelfth centuries.[37] In the twelfth century in particular, both legists and canonists began writing systematic texts on the law of procedure that treated their subject matter in greater depth and with greater sophistication than the either work of the earlier church writers or the tentative efforts of eleventh-century lawyers who had some familiarity with Roman law.[38] The twelfth-century lawyers' writings initially ran along two separate tracks, one legist, going by the name *ordo iudiciorum*, the other canonist, going by the name *ordo iudiciarius*. But by the end of the twelfth century, these separate Romanist and canonist tracks had largely merged into a single genre.[39] For the sake of simplicity I will thus

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[36] On these genres, see generally Hermann Lange, *Römisches Recht im Mittelalter*, vol. 1, *Die Glossatoren* (Munich: Beck, 1997), 118–50; Weimar, "Die legistische Literatur," 168–260.
[37] See Linda Fowler-Magerl, Ordo iudiciorum vel ordo iudiciarius*: Begriff und Literaturgattung* (Frankfurt am Main: Klostermann, 1984), 9–11.
[38] The main example of the latter is edited in Hermann Fitting, ed., *Die Institutionenglossen des Gualcausus: Und die übrigen in der Handschrift 328 des Kölner Stadt-Archivs erhaltenen Erzeugnisse mittelalterlicher Rechtslitteratur* (Berlin, 1891), 122–28.
[39] See Knut Wolfgang Nörr, "*Ordo iudiciorum* und *ordo iudiciarius*," in Iudicium, ch. 1; Emil Ott, *Die "Rhetorica ecclesiastica": Ein Beitrag zur canonistischen Literaturgeschichte*

use the term *ordo iudiciorum* or "procedural manual" in the dissertation to describe all of these texts.

The other genre of legal writing that will be of particular importance for this dissertation is the monograph treatise (*tractatus*). *Tractatus* was a labile term in medieval and early modern jurisprudence.[40] In procedural law, the word *tractatus* usually designates a short, self-standing treatment of a particular area of procedure. These procedural *tractatus* began to appear in the years after 1230. A number of thirteenth-century *tractatus* deal in depth with the main subject of this dissertation, the Roman-canon law of positions.

Unfortunately, the textual traditions of the *tractatus* on positions are poorly understood. Even a preliminary survey of the relevant manuscripts, much less a comprehensive analysis, lies outside the scope of this dissertation. Nonetheless, some initial, if tentative, technical discussion of the texts may still be helpful for our purposes. I therefore provide, on a purely indicative basis, some rough notes on the relevant thirteenth-century texts in the appendix to this dissertation.

2.2 Legal Practice

I have been discussing sources of legal literature that are pertinent to this dissertation. There are also a number of sources of legal practice that will become especially important in chapter 2, however. I will now discuss these briefly here.

The principal primary sources documenting the application of Roman-canon procedure in the twelfth and early thirteenth centuries are the judicial records of the central and northern Italian communes, along with a variety of other types of dispute record:

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des 12. Jahrhunderts, Sitzungsberichte der philosophisch-historischen Classe der Kaiserlichen Akademie der Wissenschaften vol. 125, fasc. 8 (Vienna, 1892), 35–38.

[40] See Cortese, *Rinascimento*, 71–75.

arbitration awards,[41] decisions of seigneurial courts, and decisions of ecclesiastical officials, including judges hearing cases under delegated authority from the pope (papal judges delegate). Most of these records are written on individual parchment charters. A few from our period are recorded in notarial registers. Almost all surviving dispute decisions from the second half of the twelfth century and the turn of the thirteenth century, the period that will be the main focus of chapter 2, record civil, rather than criminal cases, with a predominance of land-related disputes. This is likely at least in part an artifact of the way in which the records were preserved. For the communes that we will be examining, religious institutions such as monasteries and cathedral chapters were the primary intermediaries through which the records survived into the modern period. These institutions often controlled extensive landholdings and thus had good reason to preserve dispute records in their favor.

There is no general census of archival materials from Italy in the twelfth or thirteenth century. In some places—Piacenza is a notorious example—large numbers of documents from our period are not even cataloged. Since a comprehensive survey of dispute records is impossible, I have therefore opted to choose several communes as examples, focusing on those records that report, as best I could tell, either judgment following a contested proceeding or a judgment in default of the appearance of one party.

Lombardy: Milan. For Milan, I examined all decisions issued in the name of the commune of Milan from the twelfth century, amounting to about ninety records, along with a

[41] In truth, no clear distinction between "public" judicial decisions and "private" arbitral awards can be drawn for the twelfth and thirteenth centuries in Italy, since communes often used the form of ostensibly voluntary arbitration to conduct public dispute resolution even in cases in which parties were compelled to participate. For discussion of this problem see Sara Menzinger di Preussenthal, "Forme di organizzazione giudiziaria delle città comunali italiane nei secoli XII e XIII: L'uso dell'arbitrato nei governi consolari e podestarili," in *Praxis und Gerichtsbarkeit in europäischen Städten des Spätmittelalters*, ed. Franz-Josef Arlinghaus et al. (Frankfurt am Main: Klostermann, 2006), 113–34.

sampling of early thirteenth-century decisions up through 1216. All of these decisions were collected and edited by Cesare Manaresi in an early twentieth-century edition.[42]

Tuscany: Pisa, Lucca, and Siena. For Pisa, I attempted to read all twelfth-century decisions, issued by whatever authority, whether communal or not, from the area of Pisa—amounting to about a hundred records—along with a sampling of decisions from the first decade of the thirteenth century. The sources for twelfth-century Pisan dispute records are the respective *diplomatici* of the Archivio arcivescovile di Pisa and the Archivio capitolare di Pisa, both housed in the Archivio storico diocesano di Pisa; the Archivio della certosa di Calci; and the Archivio di Stato di Pisa. A fifth Pisan archive, that of the conti Agostini Venerosi della Seta, contains no twelfth-century dispute records. The Archivio arcivescovile has three *fondi* containing twelfth-century sources: the twelfth-century material in the *fondo arcivescovile* and *fondo luoghi vari* has been edited, while the *fondo S. Matteo* has no relevant sources. The twelfth-century documents of the Archivio capitolare are edited up through 1192, as are all of the documents of the charterhouse of Calci for the entire century. I consulted volumes 4 and 5 of the Archivio storico diocesano di Pisa's handwritten registers (*transunti*), which provide verbatim translations into Italian, for cases from the end of the twelfth century and beginning of the thirteenth century in the Archivio capitolare. Finally, the twelfth-century documents of the Archivio di Stato di Pisa are edited in a series of typewritten or mimeographed *tesi di laurea* (undergraduate theses) housed in the Biblioteca di filosofia e storia of the Università di Pisa.

For Lucca, I read all twelfth-century decisions, issued by whatever authority, that are either reported in the register of the Archivio capitolare di Lucca, today part of the Archivio

[42] Cesare Manaresi, ed., *Gli atti del comune di Milano fino all'anno MCCXVI* (Milan: Capriolo e Massimino, 1919).

storico diocesano di Lucca, or are housed in the Archivio di Stato di Lucca. These totaled about 160 documents. I could take account of only a handful of the twelfth-century documents of the Archivio arcivescovile di Lucca; these must be read in person at the Archivio storico diocesano di Lucca. My conclusions for Lucca are thus based on the representative, but incomplete selection of sources from the cathedral chapter and state archives only; the archiepiscopal archive was not considered.

From the territory of Siena, I used as my sample the edited sources from the *fondi* of the abbey of Montecelso and the Opera metropolitana, both housed in the Archivio di Stato di Siena, along with Eugenio Casanova's registered cartulary of the documents of Berardenga.

Liguria: Genoa and Savona. For the Ligurian communes of Genoa and Savona, I relied mainly on the published editions of Genoese and Savonese notarial registers from the twelfth and early thirteenth centuries now housed in the Archivio di Stato di Genova and Archivio di Stato di Savona. These editions are complete for Savona and almost but not quite complete for Genoa.[43] For additional materials, I drew on the edited records of the basilica of Santa Maria delle Vigne in Genoa, the monastery of Sant'Andrea della Porta, and the Curia arcivescovile di Genova (registered).

Emilia-Romagna: Parma and Piacenza. For Parma, I relied on the comprehensive registers for the twelfth century produced by Giovanni Drei. My small sample of cases from Piacenza drew in part from Drei's registers, since many decisions issued at Piacenza ultimately were preserved in Parmesan archives, as well as from two *tesi di laurea*

[43] See Giorgio Costamagna, *Corso di scritture notarili medievali genovesi*, ed. Davide Debernardi (Genoa: Società ligure di storia patria, 2017), 7 (noting that all twelfth-century Genoese notarial registers have now been edited except for those attributed to Lanfranco (part only), Oberto da Piacenza, and Oberto Scriba de Mercato (part only)). For Savona, see id. at 8.

transcribing twelfth-century documents from the Archivio degli Ospizi civili di Piacenza, now housed in the Archivio di Stato di Piacenza.[44]

References to all of these sources are given where appropriate in chapter 2.

3. MAP OF THE DISSERTATION

The argument of this dissertation will proceed as follows.

I begin in chapter 1 with a brief account of Roman-canon procedure in the twelfth century, concentrating on the civil, adversarial mode. I then argue that twelfth-century jurists recognized a recurring problem of "insufficiency of proof": cases in which a plaintiff who seemed to have a meritorious case was unable to bring forward a satisfactory quantity of witness testimony or documentary evidence to prove his or her claim. I also discuss some of the options available for expanding the existing repertory of means of proof that the twelfth-century jurists considered.

In chapter 2, I turn from twelfth-century legal theory to twelfth-century legal practice. I show two ways in which central and northern Italian courts and arbitral panels addressed the proof insufficiency problem by exploiting parties to disputes as sources of proof. One approach was court-controlled. In doubtful cases in which witness and documentary proof were insufficient, it required the adjudicator to resolve doubt by choosing one party to swear an oath that confirmed the truth of some or all of the claims he or she had made at trial. An alternative, newer approach was party-controlled. A party would submit factual assertions (or as they came to be called, *positiones*, "positions") or factual questions (*interrogationes*, "interrogatories") to which the opposing party was required to respond, regularly under oath.

[44] For thorough discussion of the Placentine archives, see Pierre Racine, "Plaisance du Xème à la fin du XIIIème siècle: Essai d'histoire urbaine" (thèse, Université de Paris I, 1977), 1:vi–xxvi.

I then show the rapid dissemination of the party-controlled approach in Italian courts at the end of the century. I suggest that one reason for its swift adoption was that it made use of the parties' superior knowledge of their disputes. Because parties inevitably knew more about their dispute than the adjudicator, they were on average better positioned than the adjudicator to frame probative lines of factual inquiry.

In chapter 3, I examine the doctrinal literature that emerges in the thirteenth century in response to the developments in chapter 2. This doctrine is the Roman-canon law of positions. My central theme is that although at first the thirteenth-century lawyers concentrated simply on defining the techniques of interrogatories and positions in acceptable doctrinal terms, they were soon obliged to respond to the stresses that the new approach put on responding parties. That doctrinal response took the form of norms of admissibility limiting parties' use of interrogatories and positions. The most salient functions of the rules of admissibility, I suggest, were to protect parties from potentially abusive examination by their opponents and to mediate the tension between parties' factual inquiries and the informational needs of adjudicators.

Finally, in chapter 4, I turn for comparison to the other main area of twelfth- and thirteenth-century Roman-canon procedure in which principles of admissibility appear: the law of witnesses. My theme is that a shift analogous to the shift that gave rise to the law of positions also took place in the late twelfth- and thirteenth-century law of witnesses. Power to examine witnesses was partly shifted from adjudicators to parties. And here again, the doctrinal response of the jurists was to formulate norms of admissibility. Like the norms governing positions, these norms aimed in part at protection of witnesses from abusive questioning, but in part also at fact-finding efficiency.

I draw some brief general conclusions at the end of chapter 4.

CHAPTER 1

INSUFFICIENCY OF PROOF: THE MEANS OF PROOF IN TWELFTH-CENTURY PROCEDURAL THEORY

1. INTRODUCTION

The medieval Roman and canon lawyers who began to develop a theoretical account of procedure in the mid- to late twelfth century faced a fundamental theoretical and practical problem in the law of proof. Two means of proving a case held pride of place in the classical Roman legal and rhetorical traditions with which these lawyers were familiar: witness testimony and documentary evidence. But in at least some proceedings—as the writings of the medieval jurists themselves suggest—witnesses and documents alone could not have provided sufficient proof for courts to reach socially acceptable outcomes. That is to say, in the perception of certain contemporary observers, there were cases in which the plaintiff's case was subjectively persuasive, but objectively inadequate. In such cases, the plaintiffs' inability to overcome the burden of proof in accordance with the prescribed proof norms could result in a judgment that would not be perceived as fully legitimate. What mechanisms could make up for this insufficiency of proof?

This first dissertation chapter examines efforts on the part of the twelfth-century jurists to expand the available means of proof in Roman-canon procedure and thereby broaden the range of means that parties could use to prove their claims. In what follows, I begin by giving a brief account of how civil procedure worked in mid-twelfth-century legal theory, relying for my account on the earliest twelfth-century systematic text on procedure, the letter *Karissimo amico et domino A.* of the Bolognese jurist Bulgarus (part 2). I then

survey the available means of proof in twelfth-century procedural theory. These theoretical writings treated witnesses and documents as the means of proof *par excellence*. But as I suggest, the jurists perceived witness testimony and documentary evidence to be insufficient to reach a satisfying outcome in many cases (part 3). Over the course of the second half of the twelfth century, procedural writers explored the use of other means of reaching satisfying outcomes in proceedings, including presumptions of fact, party oaths, and "confession" (*confessio*)—the admission of the claim of one party by the opposing party (parts 4 and 5). I end the chapter by discussing the especially difficult theoretical problems that the last of these means—party confession—posed for the jurists (part 5).

My main theme in this chapter is that up through the last years of the twelfth century, the jurists were unable to work out an effective technique of exploiting the most valuable informational resource in a trial—the parties themselves—as means of factual proof. The treatment of this theme in what follows will set the backdrop for subsequent chapters of the dissertation, where I will discuss a new method of using parties as sources of information at trial and the consequences of that method for the law of evidence.

2. PROCEDURE IN THE MID-TWELFTH CENTURY: THE LETTER OF BULGARUS

The earliest systematic treatment of the emerging new twelfth-century procedure takes the form of a letter written by Bulgarus, a distinguished law professor at Bologna, in response to a request from Aimericus, the then-papal chancellor.[1] Since Aimericus is

[1] There are two editions: Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 4, fasc. 1, *Excerpta legum edita a Bulgaro causidico* (Innsbruck: Wagner, 1925); Agathon Wunderlich, ed., "Bulgari summa de judiciis," in *Anecdota quae processum civilem spectant* (Göttingen, 1841), 7–26. The Wunderlich edition, although marginally superior, reports only the first part of the text. For

addressed in his capacity as "chancellor of the Holy Roman Church" (*sanctae Romanae ecclesiae cancellario*), the letter must date to his time in office, 1123–41[2]; a more precise date of 1135 has recently been proposed.[3]

Bulgarus's letter outlines the skeleton of a new procedure that would be elaborated on over the course of the next century and a half. A judicial proceeding in the first instance, in Bulgarus's account, is a proceeding between a plaintiff and a defendant before a single neutral judge. "A judicial proceeding," the jurist says, "is understood as an act of at least three persons: a plaintiff, who claims; a defendant, who avoids the claim; and a judge in the middle, who takes cognizance."[4] The judge in this proceeding is an official who holds jurisdiction, "such as a praetor, a governor, an urban prefect, [or] a person who has been delegated by these […]."[5] He is appointed by the "public power," that is to say either by the "prince" or by "those who work under him."[6] Certain categories of person are barred from serving as a judge. Grounds for disqualification of a judge arise either from "nature"—

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the historical context of the letter, see Johannes Fried, "Die römische Kurie und die Anfänge der Prozeßliteratur," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 59 (1973): 151–74; see also Bruce C. Brasington, *Order in the Court: Medieval Procedural Treatises in Translation* (Leiden: Brill, 2016), 80–86.

[2] Linda Fowler-Magerl, Ordo iudiciorum vel ordo iudiciarius*: Begriff und Literaturgattung* (Frankfurt am Main: Klostermann, 1984), 37.

[3] See André Gouron, "Innocent II, Bulgarus et Gratien," in *Vetera novis augere: Studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi*, ed. Stanisław Grodziski et al. (Kraków: Wydawnictwo Uniwerstytetu Jagiellońskiego, 2010), 1:260.

[4] Wunderlich, "Bulgari summa," § 8, at 20–21 ("Judicium accipitur actus ad minus trium personarum, actoris intendentis, rei intentionem evitantis, judicis in medio cognoscentis."); see also Wahrmund, *Quellen*, 4.1:6.

[5] Wunderlich, "Bulgari summa," § 1, at 13 ("Judex vero est, qui jurisdictioni praeest, uti praetor, praeses, praefectus urbis, et qui ab his delegatus est […]."); see also Wahrmund, *Quellen*, 4.1:1.

[6] Wunderlich, "Bulgari summa," § 2, at 14 ("[J]udicem dat potestas publica, ut princeps, et qui sub eo militant."); see also Wahrmund, *Quellen*, 4.1:1.

Bulgarus gives the examples of a mute person and a minor—or from "law"; slave status and a bad public reputation are examples of the latter category of grounds for disqualification.[7]

The proceeding of these three persons, plaintiff, defendant, and judge, consists implicitly of two main phases—a pleading phase and a proof phase—separated by the parties' joinder of issue.

Pleading Phase. In the pleading phase, the first of these persons, the plaintiff (*actor*), initiates the proceeding by stating a claim that constitutes a valid basis for an action, for example "that a thing belongs to him, or that the person is under an obligation to give to or do something for" the plaintiff.[8] The defendant (*reus*), the party "against whom the claim is made" (*adversus quem intenditur*), must then respond in one of two ways: he or she may deny the claim outright; or he or she may raise an exception, by which he or she asserts a defense to the plaintiff's claim.[9] If the defendant raises an exception, the plaintiff may respond to the allegations of the exception with an answer called a "replication" (*replicatio*). The defendant may in turn respond to the replication with a second response, called a "duplication" (*duplicatio*).[10]

Once the pleadings have been filed with the court, the judge, sitting with a copy of the holy gospels set out before him (*propositis sacrosanctis evangeliis*), is instructed to "examine

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[7] Wunderlich, "Bulgari summa," § 8, at 21 ("Judex est, qui neque natura removetur, ut mutus, neque jure, ut infamis […]. Judicare aliqui nequeunt natura, ut infantes, aliqui jure, ut servi."); see also Wahrmund, *Quellen*, 4.1:6–7.

[8] Wunderlich, "Bulgari summa," § 4, at 16 ("Actor est, qui persequitur aliquid principaliter, dicens rem suam esse, vel personam sibi obligatam ad aliquid dandum vel faciendum."); see also Wahrmund, *Quellen*, 4.1:3.

[9] The defendant's duty to respond by either denying or excepting is implied at Wunderlich, "Bulgari summa," § 5, at 16–17; see also Wahrmund, *Quellen*, 4.1:3–4. It is made explicit in the discussion of adjudication in low-value "petty" cases at Wunderlich, "Bulgari summa," § 9, at 21 (*reus negabit, excipiet*); see also Wahrmund, *Quellen*, 4.1:7.

[10] See Wunderlich, "Bulgari summa," § 5, at 17; see also Wahrmund, *Quellen*, 4.1:4.

the cause with care" (*circumspecte causam examinat*).[11] Bulgarus presumably means here that the judge should probe the parties about their respective claims and allegations, or as he puts it, "frequently question[] the parties" (*partes saepius interrogat*).[12]

The end of this initial pleading phase is reached when the parties join issue. Bulgarus does not explain exactly what form joinder should take; however, his use of the phrase *post litem contestatam* ("after issue has been joined," literally "after the litigation has been contested") implies that joinder of issue in his procedure follows at least notionally the form of *litis contestatio* in Roman law. In classical Roman formulary procedure, *litis contestatio* is the moment at which the magistrate granted an action to the parties—that is to say, specified a single issue for a lay judge to decide at trial.[13] Further indication that the author has the Roman conception of joinder of issue in mind appears later in the letter when Bulgarus discusses the legal effect of *litis contestatio* in terms that recall the classical Roman institution.[14]

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[11] See Wunderlich, "Bulgari summa," § 1, at 13–14; see also Wahrmund, *Quellen*, 4.1:1.
[12] Wunderlich, "Bulgari summa," § 9, at 21 (discussing proceedings in low-value cases); see also Wahrmund, *Quellen*, 4.1:7.
[13] See Max Kaser, *Das römische Zivilprozeßrecht*, 2nd ed., ed. Karl Hackl (Munich: Beck, 1996), 288. Documentary evidence for a reemergence of the term *litis contestatio* in the eleventh and twelfth centuries is set forth in Rudolf Sohm, *Die* litis contestatio *in ihrer Entwicklung vom frühen Mittelalter bis zur Gegenwart: Ein Beitrag zur Geschichte des Zivilprozesses* (Altenburg, Ger.: Pierersche Hofbuchdruckerei, 1914), 146–59.
[14] Compare Wunderlich, "Bulgari summa," § 10, at 22 ("Contestatione res novatur, non ut decedat aliquid set ut accedat, cum temporalis actio perpetuetur, non transitura in heredes transeat […]."), and Wahrmund, *Quellen*, 4.1:7, with Kaser, *Das römische Zivilprozeßrecht*, 296 ("Prätorische Klagen, zumeist solche *ex delicto*, die passiv, teilweise auch aktiv unvererblich und—meist einjährig—befristet waren, werden mit der [infolge der Streiteinsetzung entstandenen] Rechtshängigkeit vererblich und unbefristet."). Given this recollection of classical Roman procedure, Kenneth Pennington's proposed translation of Bulgarus's *post litem contestatam* as "after the trial has been completed" rather than "after joinder of issue" cannot be accepted. The Latin perfect subjunctive forms that follow in the section should accordingly be understood as standing in for the future perfect indicative, not the perfect indicative, as Pennington's translation implies. The future perfect indicative is

Immediately after joinder of issue, the judge is then directed to have each party swear an oath, called the "calumny oath," by which the plaintiff swears he or she is not bringing a claim, and the defendant swears he or she is not opposing the plaintiff's claim, out of maliciousness or trickery (*calumnia*).[15]

Proof Phase. With issue joined and the calumny oath sworn by the parties, the proceeding now moves into the second, proof phase. Who must do what in this phase depends on the placement of the burden of proof. The plaintiff bears the burden of proving his claim, and if that burden is not met, sentence is issued for the defendant.[16] If however the plaintiff satisfies the burden of proof but the defendant has raised an exception, the burden then ordinarily lies on the defendant to establish the factual foundation of the exception. In

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standardly represented in primary-sequence subordination by the perfect subjunctive. The perfect subjunctive forms thus look prospectively to the remaining course of the proceeding as of the moment of joinder of issue, not retrospectively to an already-completed "trial." Compare Wunderlich, "Bulgari summa," § 3, at 15–16 ("Praeterea post litem contestatam religione jurisjurandi arctandi sunt, quod omni virtute sua, omnique ope, quod verum et justum existimaverint, id suo litigatori inferre procurent, nihil, quod sibi possibile est, de industria relinquentes."), and Wahrmund, *Quellen*, 4.1:3, with Kenneth Pennington, "Bulgarus, *De arbitris <et iudicibus>*: Vat. lat. 8782, fol. 94v-95r," Medieval Legal History, accessed June 4, 2019, http://legalhistorysources.com/Law508/BulgarusDeArbitris.htm ("Therefore after the trial has been completed advocates must swear a solemn oath that they defended their party with all their skill and strength and spared no effort in the case. If they did omit something the judge shall supply it and an error will not injury the parties if they correct it immediately, that is within three days."). Cf. Brasington, *Order in the Court*, 90 (translating *post litem contestatam* correctly but not the verbs).

[15] Wunderlich, "Bulgari summa," § 1, at 13–14 ("Uterque […] jusjurandum de calumnia et actoris et rei fieri properat, videlicet ne per calumniam intendatur, neve per calumniam a se contradicatur […]."); see also Wahrmund, *Quellen*, 4.1:1.

[16] Wunderlich, "Bulgari summa," § 5, at 16 ("Actor ad probationem compellendus est: si obtinere velit id, quod intendat, probet: actore enim non probante, qui convenietur, etsi nihil praestiterit, obtineat, quia favorabiliores sunt rei quam actores."); see also Wahrmund, *Quellen*, 4.1:3.

Bulgarus's words, "in an exception the defendant is the plaintiff" (*reus in exceptione actor est*).[17]

Bulgarus's letter assumes that the ordinary means of proof are witness testimony and documentary evidence.[18] Between these two options, witness proof occupies practically all of the author's attention. Bulgarus says nothing about the manner in which witnesses are produced except to mention that the judge may compel witnesses to testify by legal process;[19] he says nothing whatsoever about the manner in which witnesses are examined. Bulgarus does, however, state principles of witness excusal and disqualification. He distinguishes among three categories of prospective witness. A person may be unwilling to testify but nonetheless compelled to do so, through compulsory process; the person may be unwilling to testify and excused by the court, for example because of old age or poor health; or the person may be willing to testify but "repelled" from testifying, for example because he or she is a parent summoned to testify against a child. A witness may be disqualified either by the judge acting *ex officio* or on the motion of a party raising an exception.[20]

If there is an "insufficiency" (*inopia*) of proof by witness testimony and documentary evidence, the judge may in the last resort permit one of the parties to swear an oath to make up for the insufficiency of proof. Bulgarus suggests that such an oath is a means of proof, not

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[17] Wunderlich, "Bulgari summa," §§ 4–5, at 16–17 ("[R]eus, si, intentione adversarii fundata, exceptionem opponat, ut condemnationem effugiat, actor intelligitur. Agere enim is videtur, qui exceptione utitur. […] Cumque reus in exceptione actor est, ipsum, quod excipit, probare debet."); see also Wahrmund, *Quellen*, 4.1:3–4.

[18] That witness testimony and documents are the two ordinary means of proof is implied at Wahrmund, *Quellen*, 4.1:11 (discussing what is to be done "in default of other proofs, such as witnesses and instruments" (*inopia aliarum probationum, ut testium, instrumentorum*)).

[19] See Wunderlich, "Bulgari summa," § 7, at 19 ("Ad testimonium per judicem compelli possumus, et improbe versantes absque fori praescriptione coerceri."); see also Wahrmund, *Quellen*, 4.1:5.

[20] See Wunderlich, "Bulgari summa," § 7, at 19–20; see also Wahrmund, *Quellen*, 4.1:5–6.

simply a means of decision. In other words, when a party swears the oath, he is attesting to the truth of his factual allegations; he is not merely swearing the oath in a sort of test or trial to decide the case, without reference to the factual allegations at issue in the proceeding. As Bulgarus puts it, the party who swears the oath "by swearing obtains [a favorable judgment] because he [thereby] produces credence in the judge" (*fidem iudici faciens iurando optineat*). "The oath" in such cases "is said not so much [to be] in place of proof as [to be] proof [itself]" (*sacramentum non tam loco probationis quam probatio dicitur*). The choice of whether to allow the swearing of an oath to prove a case lies in the discretion of the fact finder. This discretion also includes the power to choose the party who will be invited to take the oath. "Sometimes" (*interdum*) this party is the plaintiff, but "sometimes" it is instead the defendant. The choice of party depends implicitly on which of the two parties, if either, the judge finds subjectively persuasive.[21]

However the case of the party bearing the burden of proof is proved, or not proved, the proceeding ordinarily closes with the issuance of a sentence (*sententia*).[22] The judge may issue one of two sentences: a sentence of "condemnation," for the plaintiff, or a sentence of "absolution," for the defendant.[23] The judge issues the sentence in writing, reading it aloud to the parties, and thereafter issues a mandate for execution of sentence.[24]

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[21] Wahrmund, *Quellen*, 4.1:11.
[22] In developed Roman-canon parlance the final judgment is called the "definitive sentence" (*definitiva sententia*), a term borrowed from postclassical Roman law.
[23] See Wunderlich, "Bulgari summa," § 1, at 13–14 ("Uterque […] ad dirimendas lites et terminandas causas sine sorte et fraude laborat, nunc absolvendo, nunc condemnando […]."); see also Wahrmund, *Quellen*, 4.1:1.
[24] As implied by the discussion of petty cases at Wunderlich, "Bulgari summa," § 9, at 21 ("Judex […] pronuntiet […] sedens, scribens, de scripto partibus recitans, executioni quod judicatum est mandans."); see also Wahrmund, *Quellen*, 4.1:7.

Bulgarus concentrates in his letter on setting forth the two-phase procedure just outlined. It is a procedure for civil disputes, between a single plaintiff and defendant, before a judge sitting alone without a jury. These three *personae* of plaintiff, defendant, and judge are the only essential actors in the proceeding. Nonetheless, Bulgarus notes that another *persona*, the advocate for a party, may also participate in the proceeding. In his account, advocates "enter the proceeding, providing aid to each party" (*ingrediuntur judicium, utrique parti suum praestantes auxilium*). An advocate's task is to conduct oral argument for one of the parties (*est officium causas perorare*).[25] To ensure that the arguments are presented with appropriate care, the jurist explains that these advocates must swear an oath after joinder of issue "that they will, with all their strength and ability, take care to bring forward what they think true and just for their litigant, leaving behind nothing that with diligence is possible for them."[26]

Moreover, Bulgarus makes clear that certain *personae*, those of the judge and the plaintiff, can in some cases be replaced or modified.

The role of the judge can be replaced by that of an arbiter. Bulgarus emphasizes the significance of this possibility by drawing a fundamental distinction between adjudication and arbitration at the beginning of his letter. Either a judge or an arbiter can decide a case according to the procedure outlined in his letter. The essential difference, he explains, is that an arbiter is chosen to decide a dispute by the consent of the parties, whereas a judge is

[25] Wunderlich, "Bulgari summa," § 3, at 15; see also Wahrmund, *Quellen*, 4.1:2.
[26] Wunderlich, "Bulgari summa," § 3, at 15–16 ("Praeterea post litem contestatam religione jurisjurandi arctandi sunt, quod omni virtute sua, omnique ope, quod verum et justum existimaverint, id suo litigatori inferre procurent, nihil, quod sibi possibile est, de industria relinquentes."); see also Wahrmund, *Quellen*, 4.1:3.

appointed by the public power.[27] Several practical consequences flow from this difference. For example, in an arbitration, the parties agree on a penalty—such as a deposited sum of money—that the losing party will pay to the winning party if the losing party fails to comply with the eventual arbitral award. In a judicial proceeding, by contrast, the judge cannot compel the parties to make any such agreement; the judge can only compel the parties' attendance at court.[28] Even more important, whereas a judicial sentence is subject to appeal, an arbitral award is nonappealable even if it is "inequitable" (*iniquum*).[29]

Another role that can change is that of the plaintiff. Bulgarus's letter does not distinguish sharply between civil and criminal proceedings. Only one form of procedure, the form just described, implicitly applies to both civil and criminal cases. But in a criminal proceeding, the "plaintiff" is an accuser; his claim is that the defendant committed a crime. The concept of an inquisitorial proceeding, in which a judge proceeded *ex officio* against a criminal defendant, had not yet been invented. All criminal proceedings were thus necessarily accusatorial proceedings in the theory of the mid- to late twelfth century. This public significance of accusation helps to explain why Bulgarus states special rules of qualification

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[27] See Wunderlich, "Bulgari summa," §§ 1–2, at 13–14 ("Arbitrum itaque dicimus eum, cui proprio consensu compromittentes, scilicet actor et reus, partes judicis committunt. Judex vero est, qui jurisdictioni praeest, uti praetor, praeses, praefectus urbis, et qui ab his delegatus est […]. Arbitrum privati eligunt, judicem dat potestas publica, ut princeps, et qui sub eo militant."); see also Wahrmund, *Quellen*, 4.1:1.

[28] See Wunderlich, "Bulgari summa," § 2, at 14 ("Compromittitur poena invicem promissa ut, per quem factum fuerit, quominus sententiae sit paritum, ille exigatur in poenam, vel deponantur apud eum res, de quibus est controversia, ut victori praestentur, aut res aliae loco pignoris apud apud eum collocentur, ut sententiae satisfiat, aut per stipulationem hinc et inde promittitur stari sententiae. Verum judex neque in se compromitti patitur, neque pignorari, vel deponi apud se compellit: sed nec stari sententiae promitti, sed tantum judicio sisti."); see also Wahrmund, *Quellen*, 4.1:2.

[29] See Wunderlich, "Bulgari summa," § 2, at 15 ("Arbitri sententiae, et si sit iniqua, stabitur; judicis, si sit iniqua, appellatione facta mutabitur."); see also Wahrmund, *Quellen*, 4.1:2. On this feature of arbitral awards in the legist doctrine, see Antonio Padoa-Schioppa, *Ricerche sull'appello nel diritto intermedio*, vol. 2, *I glossatori civilisti* (Milan: Giuffrè, 1970), 80–88.

for accusers. Woman and wards, for example, are disqualified from bringing accusations, as are persons who fail to meet a minimum property requirement.[30]

3. THE PROBLEM OF PROOF INSUFFICIENCY

Bulgarus's letter contains more than the material in the foregoing paragraphs. The foregoing material nonetheless suffices to introduce the basic questions of procedural law, grounded in the sources of ancient Roman and canon law, that would occupy the creative energies of the jurists for the rest of the twelfth century.

In particular, one element of Bulgarus's letter—his mention of the possibility of an "insufficiency of proofs" (*inopia probationum*)—hints at a theoretical and practical question that would challenge the jurists who studied procedure in the later twelfth century. What means were available to a party to prove a case? And how could the problem of *inopia*, when it arose, be legitimately resolved?

3.1 The Principal Means of Proof: Witness Testimony and Documentary Evidence

What, then, were the available means of proof in twelfth-century procedure? Like Bulgarus's letter, later twelfth-century *ordines*, and the textual traditions on which they relied, tended to prefer witness testimony and documentary evidence as the two ordinary means of proof in judicial proceedings. To reach this conclusion, the twelfth-century jurists drew on interrelated traditions: the tradition of ancient rhetoric and the traditions of Roman and canon law.

Rhetoric. One intellectual starting point for the jurists' reflections was the tradition of rhetorical theory that the Middle Ages had inherited from Roman antiquity. The extant texts

[30] See generally Wunderlich, "Bulgari summa," § 6, at 17–19; see also Wahrmund, *Quellen*, 4.1:4–5.

of the Roman tradition discussed forensic rhetoric at some length. These texts also, either in their original forms or through the medium of late antique adaptations and medieval florilegia, were firmly established in the school curricula of the twelfth century, and hence also in the propaedeutic training of the early jurists.[31] The *De inventione* of Cicero and the *Rhetorica ad Herennium*, both from the first century B.C., as well as the fifth-century *De nuptiis Philologiae et Mercurii* of Martianus Capella, were all studied either directly or indirectly up through the end of the twelfth century. The sixth-century *Institutiones divinarum et saecularium litterarum* of Cassiodorus and the late sixth- or early seventh-century *Etymologiae* of Isidore of Seville, both encyclopedic works containing substantial sections on rhetoric, were also widely read.[32]

These texts from the ancient rhetorical tradition tended to prize above all witness testimony, and then documentary evidence, as means of proving a case. Such a preference comes through clearly in a passage of Isidore's *Etymologiae* in which the author defines the means of proof. "Proof consists," Isidore reports, "in witnesses and in the credibility of tablets."[33] Isidore, who is known to have relied heavily on the earlier rhetorical tradition in

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[31] For general discussion of the influence of rhetorical training on the early jurists see Erich Genzmer, "Die iustinianische Kodifikation und die Glossatoren," in *Atti del Congresso internazionale di diritto Romano (Bologna e Roma xvii–xxvii aprile MCMXXXIII): Bologna*, vol. 1 (Pavia: Fusi, 1934), 385–88; Elisabetta Graziosi, "Fra retorica e giurisprudenza," *Studi e memorie per la storia dell'università di Bologna*, n.s., 3 (1983): 3–38; Albert Lang, "Rhetorische Einflüsse auf die Behandlung des Prozesses in der Kanonistik des 12. Jahrhunderts," in Martin Grabmann and Karl Hofmann, eds., *Festschrift Eduard Eichmann zum 70. Geburtstag: Dargebracht von seinen Freunden und Schülern in Verbindung mit Wilhelm Laforet* (Paderborn: Schöningh, 1940), 69–71.

[32] See Paul Oskar Kristeller, "Philosophy and Rhetoric from Antiquity to the Renaissance," in *Renaissance Thought and Its Sources*, ed. Michael Mooney (New York: Columbia Univ. Press, 1979), 241; Richard McKeon, "Rhetoric in the Middle Ages," *Speculum* 17 (1942): 13.

[33] Isid. *Etym.* 18.15.5 ("Probatio autem testibus et fide tabularum constat.").

his work,[34] probably drew his definition of proof from earlier Latin rhetorical manuals; a somewhat similar statement appears in a fourth-century rhetorical treatise, the *Ars rhetorica* of Gaius Julius Victor, which speaks of "testimony" being given "either by those present [at the judicial proceeding] or through tablets."[35] Other standard texts of the twelfth-century curriculum manifested similar, if not identical preferences. The *De nuptiis Philologiae et Mercurii* of Martianus Capella explained that an argument made about an issue of fact, in order to be convincing (*ad faciendam fidem*), had to be accompanied by what ancient rhetorical theory called "inartificial proofs" (*inartificia*), "such as tablets, witness testimony, and examination by torture" (*ut tabulae, testimonia, quaestiones*).[36] In a summary of his account of forensic rhetoric, Martianus repeats his preference. The main sources of proof, he says, lie "in writing, as [in the writing on] tablets; in assertion, as [in the assertions] of witnesses; [and] in compulsion, as [through the compulsion] of instruments of torture" (*in scriptura, ut tabularum, in auctoritate, ut testium, in necessitate, ut tormentorum*).[37] For Cicero, writing in the *De inventione*, inferential argument in a forensic setting needed to be backed up with proof from "examinations [by torture(?)], witness testimony, [and public] rumors" (*quaestiones, testimonia, rumores*)—proof, in other words, from witness testimony with or without torture, along with reports of rumor.[38] In short, the ancient rhetorical tradition, although it did not speak with one voice, expressed strong favor for proof first by witness testimony, and second by documentary evidence ("tablets").

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[34] See Jacques Fontaine, *Isidore de Séville et la culture classique dans l'Espagne wisigothique*, 2nd ed. (Paris: Études augustiniennes, 1983), 1:211–29, 321–27.
[35] Karl Halm, ed., "C. Iulii Victoris Ars rhetorica," in *Rhetores Latini minores* (Leipzig, 1863), c. 6, § 6 (*de praeiudiciis*), at 406 ("Testimonia aut per tabulas dicuntur aut a praesentibus.").
[36] James Willis, ed., *Martianus Capella* (Leipzig: Teubner, 1983), para. 474.
[37] Id., para. 498.
[38] Cic. *Inv.* 2.46.

Roman law. In addition to the rhetorical tradition, the classical legal tradition—itself profoundly shaped by rhetoric[39]—was also available to the twelfth-century jurists in the form of the *Corpus iuris* of Justinian.[40] Here too, witness and documentary proof played predominant roles. To the twelfth-century jurists, the special significance of proof by witnesses in the *Corpus iuris* would have been readily apparent from titles *de testibus*, devoted solely to witness proof, in the *Digest* and the *Code*.[41] Also readily apparent would have been the significance of documentary proof, discussed in the *Digest* title *de fide instrumentorum et amissione eorum* ("on the credibility of documents and their loss") and in the *Code* title *de fide instrumentorum* ("on the credibility of documents").[42]

Canon law. Alongside the Roman-law *Corpus iuris*, mid- to late-century canon lawyers would also have had at their disposal the *Decretum* of Gratian. From here the perspective of the law of proof that one would have gained was somewhat different. Like the rhetorical tradition and the *Corpus iuris*, the *Decretum* placed particular emphasis on the use of proof by witnesses.[43] Unlike these other texts, however, the *Decretum* also stressed the importance of proof by oath.[44] The attention given to oaths reflects the significance of the

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[39] The relevant literature is hopelessly vast. On the influence of rhetoric in Roman civil procedure in particular see Artur Steinwenter, "Rhetorik und römischer Zivilprozeß," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 65 (1947): 69–120.

[40] On the classical proof regime, see by way of summary Giovanni Pugliese, "La preuve dans le procès romain de l'époque classique," in *La preuve*, vol. 1, *Antiquité*, Recueils de la Société Jean Bodin pour l'histoire comparative des institutions 16 (Brussels: Éditions de la Librairie encyclopédique, 1965), 277–348.

[41] Dig. 22.5; Cod. 4.20.

[42] Dig. 22.4; Cod. 4.21.

[43] See the passages cited in Fernando Della Rocca, "Il processo in Graziano," *Studia Gratiana* 2 (1954): 294–96; see also Filippo Liotta, "Il testimone nel 'Decreto' di Graziano," in *Proceedings of the Fourth International Congress of Medieval Canon Law: Toronto, 21–25 August 1972*, ed. Stephan Kuttner (Vatican City: Biblioteca apostolica vaticana, 1976), 81–93.

[44] See the passages cited in Della Rocca, "Il processo in Graziano," 292–94.

then-current practice of "canonical purgation" (*purgatio canonica*) in ecclesiastical proceedings. In this practice, a defendant would be permitted to "purge" himself of the charge of an ecclesiastical offense by swearing his innocence with the help of a group of compurgators, who in turn would swear their belief in the defendant's innocence.[45]

Given these strands of textual tradition available to the jurists, we cannot be surprised to find the prime role of witness and documentary proofs in the early *ordines* following Bulgarus in the middle and later years of the twelfth century.

Among texts produced by legists, three *ordines* from later in the century, all composed after 1160 by jurists active in southern France, are explicit that proof means witnesses and documents. The anonymous procedural text *Si quis de re quacumque* states expressly that the plaintiff "will prove […] what he has to prove by means of witnesses and documents […]."[46] The text *Quedam iudiciorum preparativa explanaturi* is similarly restrictive: "A question of fact […] is lawfully determined by means of witnesses or documents."[47] The author of the *Tractaturi de iudiciis primo de preparatoriis iudiciorum* provides a more capacious enumeration of the means of proof while still giving witnesses and documents pride of place: "By means of what reasons must [proof] be made? By means of

[45] On canonical purgation in the *Decretum* and the *Decretum*'s sources, see Antonia Fiori, *Il giuramento di innocenza nel processo canonico medievale: Storia e disciplina della* purgatio canonica (Frankfurt am Main: Klostermann, 2013), 228–37.
[46] *Si quis de re quacumque*, in *Placentini iurisconsulti vetustissimi de varietate actionum libri sex* […] (Mainz, 1530), lib. 4, tit. 17 (*de testibus*), at 104 ("Probabit autem quod probaturus est testibus et instrumentis […]."). For date and place of composition, see André Gouron, "Sur un casse-tête: L'*ordo Si quis de re quacumque*," *Initium* 11 (2006): 107–20 (probably Sisteron (Alpes-de-Haute-Provence), 1165–80).
[47] Munich, Bayerische Staatsbibliothek, MS Clm 16084, fol. 71va ("Facti vero questio per testes vel instrumenta legitime diffinitur."). See also Fowler-Magerl, Ordo iudiciorum, 81 (composed in southern France, after 1160, before 1171).

witnesses, documents, indicia, [and] *fama* [i.e., public rumor about a particular fact] acting in accord with presumptions."[48]

Like their secular counterparts, twelfth-century *ordines* produced for use in ecclesiastical proceedings also often, although not exclusively, concentrated on witnesses and documents, or even witness testimony alone, as the expected means of proof. The northeast German text *Etiam testimonia removentur*, despite alluding to "innumerable" (*innumerabilibus*) methods of proving a question of fact, mentions only witness testimony, documents, and "conjectures" (*coniecturis*) as means of proof. "A question of fact," the author affirms, "must be proved by means of conjectures, instruments, charters, and indeed all the innumerable other [methods] that lend a moiety [of credibility] to the proof."[49] The canonist *Rhetorica ecclesiastica*, an *ordo* probably produced in or around Hildesheim in western Germany around 1160 in an early attempt to incorporate texts from the *Decretum* into an exposition of ecclesiastical procedure, discusses only witness testimony as an explicit source of proof.[50] *Ordines* attributed to the British Isles similarly assume that proof will regularly be established with witness testimony and documents, or in the case of the English text *Iudicium est trinus personarum trium actus, actoris et rei et iudicis in medio*

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[48] Carl Gross, ed., *Incerti auctoris ordo judiciarius, pars summae legum et tractatus de praescriptione: Nach einer Göttweiger (Stiftsbibliothek. saec. XII. ex.) und einer Wiener (Hofbibliothek. saec. XIII. ex.) Handschrift* (Innsbruck, 1870), pt. 1, § 6, at 115 ("Quibus rationibus fieri debet? Testibus, instrumentis, indiciis, consentiente praesumptionibus fama."). See also Fowler-Magerl, Ordo iudiciorum, 60 (composed in France, after 1160).
[49] Fowler-Magerl, Ordo iudiciorum, 264 ("[Q]uestio facti coniecturis, instrumentis, cartulis, videlicet et ceteris innumerabilibus, que probationi amminiculum prestant, probari debet."); see also id. at 56 (composed in the "[n]ordostdeutscher Raum," ca. 1160).
[50] See Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 1, fasc. 4, *Die "Rhetorica ecclesiastica"* (Innsbruck: Wagner, 1906), 70–76; see also Fowler-Magerl, Ordo iudiciorum, 46–51 (composed "[w]ahrscheinlich Hildesheim oder Umgebung ca. 1160"). Contra Wahrmund, *Quellen,* 1.4:viii–x (probably France, before 1190).

cognoscentis by witness testimony alone.[51] So too the northern French *In principio de ordine iudiciario agitur*, which provides that the lawyers are to "ventilate" the case "up until the production of witnesses and documents" and which instructs the plaintiff to "fortify his side [of the case] by means of witnesses and documents."[52]

3.2 Concerns about Insufficiency

Already in the second half of the twelfth century, but also in the thirteenth, one occasionally finds complaints from the jurists that the ordinary repertory of proofs—witnesses and documents—was simply too restricted. We have already noted Bulgarus's concern with *inopia probationum*.[53] The anonymous English author of another *ordo*, *Quoniam ea que in civilibus negotiis*, put the problem in starker terms, observing that "litigants very often labor under an insufficiency of proofs."[54] A more specific concern appears in a treatise on witnesses by the twelfth-century jurist Albericus. Albericus remarks

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[51] See *Quoniam eaque in civilibus negotiis*, in Gustav Hänel, ed., *Incerti auctoris ordo iudiciorum (Ulpianus de edendo)* (Leipzig, 1838), tit. *de probationibus*, at 30 ("Sciant igitur omnes, rem eam se debere in publicam notitiam deferre, quae munita sit idoneis testibus vel instructa legitimis documentis vel indiciis ad probationem manifestis et luce clariore expedita."); *Iudicium est trinus personarum trium actus, actoris et rei et iudicis in medio cognoscentis*, in Fowler-Magerl, Ordo iudiciorum, 297–300; *Quia iudiciorum quedam sunt preparatoria*, in Johann Friedrich Ritter von Schulte, ed., "Der *ordo iudiciarius* des Codex Bambergensis P. I. 11.," *Sitzungsberichte der philosophisch-historischen Classe der Kaiserlichen Akademie der Wissenschaften* 70 (1872): 313. Dates and places of composition in Fowler-Magerl, Ordo iudiciorum, 67, 104–5 (respectively: probably England, ca. 1140–70; probably Canterbury, ca. 1182–83; composed for use in England or Ireland, shortly after 1182).

[52] Friedrich Kunstmann, "Ueber den ältesten *ordo judiciarius* mit Rücksicht auf: *Magistri Ricardi Anglici ordo judiciarius ex codice Duacensi, olim Aquicinctino, nunc primum editus per Carolum Witte. Ictum Halensem.* Halis 1853. 4o S. 80 und X.," *Kritische Überschau der deutschen Gesetzgebung und Rechtswissenschaft* 2 (1855): 19 ("Mox per advocatos causa ventilabitur usque ad testium vel instrumentorum productionem."); id at. 21 ("[F]undabit actor intentionem suam et muniet partem suam testibus et instrumentis."); see also Fowler-Magerl, Ordo iudiciorum, 88 (composed Amiens or Rouen ca. 1171).

[53] See supra text accompanying note 21.

[54] Hänel, *Incerti auctoris ordo*, tit. *de iureiurando*, at 36 ("plerumque inopia probationum laborant litigantes").

that a party who wishes to present witness testimony might be faced with an "insufficiency of proofs" (*inopia probationum*) because of the excusal or disqualification of witnesses; the extensive qualification rules of Roman-canon procedure excused or disqualified a number of categories of person from giving testimony under some or all circumstances.[55]

Writing in retrospect from the thirteenth century, other jurists likewise insisted that restriction of proof to witness testimony and documentary evidence created serious difficulties for the plaintiff. As the jurist Jacobus de Arena put it, "because the burden of proof is heavy, especially by means of witnesses, for this reason the law (Dig. 6.1.24) says that it is a weighty matter to meet burdens of proof."[56] A treatise attributed to the thirteenth-century jurist Odofredus concurs.[57]

We should pause briefly to consider what an *inopia* of proof would have meant in the twelfth century. In the thirteenth and later centuries, the theorists of Roman-canon procedure developed elaborate rules of proof sufficiency—minimum quantities of proof required to satisfy the burden of proof in different types of case. These rules, especially those applicable in criminal cases, are one of the characteristic features of premodern Continental

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[55] See Erich Genzmer, "Summa de testibus ab Alberico de Porta Ravennate composita," in *Studi di storia e diritto in onore di Enrico Besta per il xl anno del suo insegnamento* (Milan: Giuffrè, 1937), 1:502. For the qualification rules, see chapter 4 of this dissertation.

[56] "Iacobi de Arena De positionibus," § 4, rub. *nunc consideremus, quod*, num. 1, in *Tractatus universi iuris*, vol. 4 (Venice, 1584), 6va ("Cum sit grave onus probandi, et maxime per testes, unde dicit lex, quod grave est ad onera probationis venire, ff. de rei vindicatione, l. is qui destinavit [Dig. 6.1.24], et positiones succedunt loco probationum."). In Dig. 6.1.24, the Roman jurist Gaius counsels a party who wishes to claim property that it is "much easier" (*longe commodius*) first to obtain possession of the property by means of a possessory interdict, if possible, since the burden will then lie on the opposing party to prove ownership.

[57] See "Odofredi Beneventani De positionibus," num. 14, in *Tractatus universi iuris*, 4:2va–b ("[… Inventae sunt positiones ad probandum per confessionem, quae per testes, vel instrumenta probari non possunt […].") Cf. "Uberti de Bobio De positionibus," num. 4, in *Tractatus universi iuris*, 4:8ra.

procedures.[58] They have long fascinated legal historians.[59] In the twelfth century, by contrast, explicit rules of proof sufficiency are practically nowhere to be found; the main exception is a nascent principle, discussed in chapter 4 of this dissertation, that the testimony of at least two witnesses is ordinarily required in any case in which proof by witnesses is used. *Inopia probationum* in Bulgarus's letter thus must have meant something vaguer, perhaps only an implicit sense on the part of judges, parties, and observers that the quantum of proof presented in certain proceedings was insufficiently persuasive, or too exiguous to support a socially legitimate judgment of the court.

4. OTHER MEANS OF PROOF

4.1 Rhetorical Techniques

Whatever exactly an *inopia probationum* was understood to mean, several options for expanding the range of acceptable means of proof presented themselves to the twelfth-century jurists.

One option was to draw, once again, on the resources of the ancient rhetorical tradition. The rhetoricians had devised several argumentative techniques that lawyers could

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[58] For a synthetic treatment of these rules across the period of the *ancien régime*, see Mirjan Damaška, *Evaluation of Evidence: Premodern and Modern Approaches* (Cambridge: Cambridge Univ. Press, 2019), 47–117.

[59] The starting point for debate in the twentieth-century literature is Jean-Philippe Lévy, *La hiérarchie des preuves dans le droit savant du Moyen-Âge: Depuis la renaissance du droit romain jusqu'à la fin du XIVe siècle* (Paris: Sirey, 1939). For subsequent discussion of the proof sufficiency rules, see especially Damaška, *Evaluation of Evidence*; Richard M. Fraher, "Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7 (1989): 23–88; John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: Univ. of Chicago Press, 1977); Mathias Schmoeckel, *Humanität und Staatsraison: Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozess- und Beweisrechts seit dem hohen Mittelalter* (Cologne: Böhlau, 2000). Note however that this literature deals almost exclusively with the rules as applied to criminal, not civil, proceedings.

use in court. One strand of ancient rhetorical theory, for example, recommended the use of different types of syllogistic reasoning relying on what it called "signs" (σημεῖα, *signa*, *indicia*) in order to reach the likely truth about a thing. A sign was a fact that could serve as the basis for a logical inference to establish a thing that one wished to demonstrate.[60] Another strand of rhetorical theory, called the theory of *status*, posited among other things that all questions of fact could be classified into a set of fixed types: for example, the question of whether something exists (a question type known as the "conjecture" (*coniectura*) status), or the question of what kind of thing something is.[61] In this tradition, the concept of proof by these techniques was referred to as *argumentum*, "argument."[62]

Such ideas from the rhetorical tradition seeped quite early into the writing of the medieval jurists. The rhetorical idea equating "proof" (*probatio*) and "argument" (*argumentum*), for example, is explicitly adopted in an early gloss—attributed to the jurist Irnerius—on an occurrence of the Latin word *probationes* ("proofs") in the *Code*. The gloss reads: "that is to say, arguments" (*id est argumenta*).[63] Unsurprisingly, several twelfth-century *ordines* also show the influence of this argument-based conception of proof. Among the legist *ordines*, the southern French text *Tractaturi de iudiciis primo de preparatoriis iudiciorum* refers to the use of *indicia* ("signs") in addition to other means of proof.[64] Among texts produced for ecclesiastical use, the northeast German *Etiam testimonia removentur* alludes to the rhetorical theory of status when it advises the reader that "if a case is proven to

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[60] See Alessandro Giuliani, *Il concetto di prova: Contributo alla logica giuridica* (Milan: Giuffrè, 1961), 31–33, 62–65 (with references to the sources).
[61] See, e.g., id. at 93–94.
[62] See id. (citing Cic. *Top.* 8 ("Itaque licet definire […] argumentum […] rationem quae rei dubiae faciat fidem.")).
[63] Gl. ad Cod. 2.1.4 v. "probationes" (".I. (id est) arg[*umenta*]."), in Gustav Pescatore, *Die Glossen des Irnerius* (Greifswald, 1888), 101.
[64] Gross, *Incerti auctoris ordo*, tit. 11 (*de probationibus*), § 6, at 115.

the judge solely by means of conjectures or other arguments, the proof is made stronger if the testimony of one [witness] is added to it."[65] The English or Irish *Quia iudiciorum quedam sunt preparatoria* explicitly lists "arguments" among the means of proof.[66]

A rhetorical influence is also apparent in a new area of the law of proof developed to mitigate the difficulty of adducing sufficient proof: the law of presumptions. Presumptions were rules that shifted the burden of proof under certain circumstances from one party to the other, thus reducing the difficulty of satisfying the *onus probandi* by other means of proof. They appear in two *ordines* from the last decades of the twelfth century, perhaps following the work of jurists active in southern France.[67] The southern French *Tractaturi de iudiciis primo de preparatoriis iudiciorum* contains an entire title on presumptions that is placed directly after the titles *de testibus* ("on witnesses"), *de numero testium* ("on the number of witnesses"), and *de instrumentis* ("on documents").[68] The British ecclesiastical text *Quia iudiciorum quedam sunt preparatoria* also discusses presumptions in its title on proof.[69]

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[65] Fowler-Magerl, Ordo iudiciorum, 264 ("Si enim coniecturis sive aliis argumentis causa tantum probata fit iudici, si ad hoc etiam unius testimonium accesserit, firmior fit probatio.").
[66] Schulte, "Der *ordo*," tit. 16 (*de probationibus*), at 313 ("Item argumentis probatur.").
[67] On the origins of the law of presumptions, see especially André Gouron, "Aux racines de la théorie des présomptions," *Rivista internazionale di diritto comune* 1 (1990): 99–109 (arguing that the conception of the presumption as a means of proof was invented by the southern French jurist Géraud le Provençal, author of the second recension of the *Summa Trecensis*, and that the distinction between presumptions of law and presumptions of fact was devised by the glossator Rogerius, who was also active in southern France); André Gouron, "Placentinus, 'Herold' der Vermutungslehre?," in *Juristes et droits savants: Bologne et la France médiévale* (Aldershot, Eng.: Ashgate, 2000), 90–103 (attributing further development of the theory of presumptions to the jurist Placentinus); Lang, "Rhetorische Einflüsse," 71–85 (discussing the relationship between rhetorical theory and the theory of presumptions).
[68] See Gross, *Incerti auctoris ordo*, tit. 15 (*de praesumptionibus*), at 128–30.
[69] Schulte, "Der *ordo*," tit. 16 (*de probationibus*), at 313 ("Praesumptiones quoque proficiunt, sed non sufficiunt, ut testis unus et fama […]. Interdum tamen ex praesumtione sola sententiatur […]. Sententia ergo datur *vel per probationem, ut per instrumenta et per testes, vel propter praesumtiones* […]" (emphasis added).).

4.2 **Oaths**

The techniques of argument derived from rhetoric, although useful to a point, did not actually enlarge the corpus of data available to fact finders. Such an enlargement required instead that the jurists find a means of using the *parties themselves*, rather than witnesses or documents, as sources of proof in trials.

Perhaps the most obvious means of using parties as sources of proof in proceedings was to have parties swear oaths attesting to the truth of their assertions. We have already seen that Bulgarus in his letter permitted the judge to have one of the parties swear an oath when there was "an insufficiency of other proofs" (*inopia aliarum probationum*).[70] The option of using some form of oath to force a party to stand by a particular account of a dispute had strong textual authority behind it. In canon law, ecclesiastical procedure had expressly permitted a defendant to demonstrate his innocence by swearing an oath, in the procedural technique known as "canonical purgation," since the turn of the seventh century.[71] As we have seen, norms to this effect were collected in Gratian's *Decretum*. In Roman law, meanwhile, the classical law allowed the use of an oath to reach a decision mainly in cases involving claims of money owed.[72] The postclassical law, however, considerably expanded the range of cases in which oaths could be used.[73] By the time of Justinian, a party could request that the opposing party swear an oath to decide a case; the judge could also direct one of the parties to swear an oath, and if that party refused, the case would automatically be

[70] Wahrmund, *Quellen*, 4.1:11; see also supra text accompanying note 21.
[71] See Fiori, *Il giuramento*, 3, 17, 47.
[72] See Kaser, *Das römische Zivilprozeßrecht*, 268–69.
[73] See generally id. at 590–92.

decided against him.[74] The significance of oaths for postclassical civil procedure is reflected in both the *Digest* the *Code*, which each contain title dealing with them: a title *de iureiurando sive voluntario sive necessario sive iudiciali* ("on voluntary, necessary, and judicial oath taking") in the *Digest*; a title *de rebus creditis et de iureiurando* ("on extension of credit and on oath taking") in the *Code*.[75]

For all this textual authority, however, discussion of oaths as a means of proof is by no means common to all the twelfth-century *ordines*. After Bulgarus's letter, no legist *ordo* discusses oaths as means of proof until the very end of the century. Among canonist *ordines*, only the *Quoniam ea que in civilibus negotiis* and *Rhetorica ecclesiastica* discuss the oath as a means of proof. The author of *Quoniam ea que in civilibus negotiis*, whom we have already quoted briefly above,[76] suggests that oaths are used to reach decisions in a great number of civil proceedings. "A sought-after [form of] aid that is common to almost all cases, namely oath taking, was invented," he explains, "because litigants very often labor under an insufficiency of proofs."[77] The author goes on to set forth an account of oaths that resembles the schema of postclassical Roman law.[78] Discussion of oaths is also present in the German ecclesiastical *ordo* the *Rhetorica ecclesiastica*. But here the attention of the author is mainly directed to justifying the taking of oaths from an ethical standpoint. The author quotes from

[74] The different types of oath in postclassical civil procedure are discussed in Dieter Simon, *Untersuchungen zum justinianischen Zivilprozeß* (Munich: Beck, 1969), 316–43 (with references to the primary sources).
[75] Dig. 12.2; Cod. 4.1.
[76] See supra text accompanying note 54.
[77] Hänel, *Incerti auctoris ordo*, tit. *de iureiurando*, at 36 ("Quia plerumque inopia probationum laborant litigatores, inventum est emendicatum iuris suffragium, quod fere omnibus causis commune est, scilicet iusiurandum […].").
[78] See id. at 36–37.

various scriptural and legal authorities to support his conclusion that the taking of oaths in judicial proceedings is permissible.[79]

The relatively slight attention given in the *ordines* to the party oath as a means of proof is striking when one compares twelfth-century Roman-canon procedure to earlier procedures used in northern Italy. For example, the seventh-century Edict of Rotari, a compilation of norms used under the rule of the Lombards in the early Middle Ages, relied not only on witness testimony and documents, but on trial by battle and the oath as its primary means of proof.[80]

The relative neglect is perhaps less striking, however, when one examines the explanation that Bulgarus himself gives in his letter for the use of oaths. The argument-based conception of proof that the twelfth-century jurists had borrowed from the ancient rhetorical tradition commonly emphasized the importance of the subjective belief (*fides*) of the fact finder. The argument that one used as proof, in other words, needed to instill belief of the existence of some material fact in the mind of the judge. Bulgarus's justification for the use of oaths reflects this line of thinking. The oath is effective as a means of proof, he argues, because it "produc[es] credence in the judge" (*fidem iudici faciens*) that the assertions of the party swearing the oath are true.[81] This justification suggests an explanation for the jurists' relative disinclination toward oaths as a means of proof. In contrast to witness testimony and documentary evidence, oaths do not offer external corroboration of one or another party's factual allegations. A party who swears an oath as proof simply commits himself on penalty of perjury to the truth of the factual assertions that he already made before joinder of issue.

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[79] See Wahrmund, *Quellen,* 1.4:60–63.
[80] Franca Sinatti d'Amico, *Le prove giudiziarie nel diritto longobardo: Legislazione e prassi da Rotari ad Astolfo* (Milan: Giuffrè, 1968), 59.
[81] Wahrmund, *Quellen*, 4.1:11.

Proof by oath taking thus would naturally have seemed less attractive to jurists steeped in the classical rhetorical tradition than proof by witnesses and proof by documents.

5. CONFESSIONS

If the use of rhetorical techniques and oaths as means of proof had clear disadvantages, one other potential technique for exploiting parties as sources of evidence—the confession (*confessio*), a party's own statement against interest in a civil or criminal proceeding—was suggested by the twelfth-century jurists' sources in the *Corpus iuris* and *Decretum*.

Unfortunately, however, the concept of the confession inherited from the Roman legal tradition was also not an ideal technique for using parties as sources of evidence. The inherited concept posed two main theoretical and practical difficulties. The first difficulty was that the dominant Roman sense of the word "confession," and the one largely accepted by the twelfth-century jurists, presupposed that the confessing party would admit the *entire claim or charge* brought against him or her. Such a theory of confession did allow for the possibility that a party could "confess and avoid," confessing the opposing party's claim but then raising an exception. But it did not include the possibility that a defendant might testify or otherwise provide factual evidence about only some *part* of the dispute. The second difficulty was that, even if there an acceptable theory of "partial confession" or "factual confession" could be worked out, there was no established mechanism by which either the judge or the opposing party could *elicit* such a confession.

5.1 **Confession as a Full Admission**

5.1.1 Confessions in the *Corpus iuris* and *Decretum*

The first difficulty—that the Roman theory of confession implied the confessing party's admission of the entire claim brought against him or her—was both reflected in and complicated by an underlying confusion in the *Corpus iuris* and the *Decretum* between two conflicting senses of the Latin word *confessio*.

In some passages of the *Corpus iuris*, "confession" meant a defendant's admission of the entirety of the plaintiff's claims. Such an admission, made at the moment of joinder of issue, bound the judge and effectively terminated the proceeding. This conception of confession is what one might call a form of *waiver* or *admission*: a party confession was wholly within the control of the party who opted to make it, and once made, the confession disposed of the entire legal claim brought against the confessing party. This waiver theory of confession was well attested in fragments of Roman law that discussed civil proceedings. Classical Roman formulary procedure permitted the defendant to "confess" liability for the plaintiff's claim during the initial phase *in iure*, conducted before a Roman magistrate, rather than to make a denial or raise an exception. Such a *confessio in iure* usually obviated the need for a second, fact-finding phase in the proceeding except, in certain cases, to estimate the value of property in controversy. The admission of the defendant was deemed binding on the judge and equivalent to *res iudicata*: *confessus pro iudicato est* ("a party who has confessed is treated as a party against whom judgment has been issued").[82] A *confessio in iure* had the same legal effect in another, archaic form of civil procedure known as *legis actio* procedure.[83]

[82] See Kaser, *Das römische Zivilprozeßrecht*, 270–73.
[83] See id. at 72–73.

In other passages of the *Corpus iuris*, "confession" meant simply a defendant's statement against interest that the fact finder evaluated—and could accept or reject—as one means of proof among others. This other conception of a confession was what could be called *evidentiary*: a party confession was, in this conception, always subject to the evaluation of the judge, who was in the end solely responsible for determining what effect, if any, it would have in a proceeding. The evidentiary theory of confession had purchase in Roman criminal law, where a confession was treated, in effect, as mere evidence of culpability that the judge could opt to disregard if he so chose.[84] The fact finder in a criminal proceeding was at least in principle free to pronounce the innocence of the accused even if the accused had confessed his own guilt or had made self-incriminating admissions of fact.[85] The evidentiary theory was also implicit in passages of the *Corpus iuris* discussing the postclassical civil procedure used in late antiquity. In those passages, a defendant's *confessio in iure*—an admission made before the judge—was no longer deemed equivalent to a full judicial finding of fact, as had been the case in earlier Roman law. A defendant's admission of the plaintiff's full claim, like a defendant's partial admission or statement against interest, was in effect simply evidence that the judge in a civil proceeding could in theory disregard.[86]

In canon law, meanwhile, words for "confession" (*confessio*) and "to confess" (*confiteor*) in the *Decretum* were similarly polysemous. Most uses of the words occurred in passages of the *Decretum* discussing penance—confession in a strictly spiritual context—not

[84] Id. at 366.
[85] The key passage indicating the magistrate's power not to accept a confession is Dig. 48.18.1.27 ("Si quis ultro de maleficio fateatur, non semper ei fides habenda est: nonnumquam enim aut metu aut qua alia de causa in se confitentur. […]"). See Wolfgang Kunkel, "Prinzipien des römischen Strafverfahrens," in *Kleine Schriften: Zum römischen Strafverfahren und zur römischen Verfassungsgeschichte*, ed. Hubert Niederländer (Weimar: Böhlaus Nachfolger, 1974), 19–23; see also Theodor Mommsen, *Römisches Strafrecht* (Leipzig, 1899), 437–38.
[86] Kaser, *Das römische Zivilprozeßrecht*, 600.

ecclesiastical procedure. But even the passages dealing only with ecclesiastical procedure used *confessio* in conflicting senses. In some passages, a confession was treated simply as evidence, subject to the same degree of judicial evaluation as witness testimony and documentary proofs (the evidentiary theory). Other passages dealing with procedure implied that a party's confession was an admission that terminated all further proceedings—an equivalent to *res iudicata* (the waiver theory).

Among the fragments that belong to the evidentiary category is a *dictum* dealing with proof of marriage in which Gratian echoes one of the definitions of proof used in the ancient rhetorical tradition, that proof is a "rationale that creates belief in a matter that is in doubt."[87] Witness testimony and confessions are, for Gratian, interchangeable means of arousing such a belief. "[… B]elief in a matter that is in doubt cannot be instilled in a judge," he asserts, "except by the authority of witnesses or by lawful confession […]."[88] A passage dealing with the standard of proof required to defrock a cleric similarly implies an equivalency between confessions and witness testimony: "Only a voluntary confession, therefore, and the canonically prescribed number, or quality, of witnesses […] deprives a cleric of his own rank."[89]

Fragments of the *Decretum* that fall into the waiver category include passages suggesting that a defendant may *either* be convicted of an offense *or* confess to it. A confession, in such passages, is implicitly treated as something other than an ordinary means of proof forming the basis for conviction. One such passage sets forth the general principle

[87] Cic. *Top.* 8 ("Itaque licet definire […] argumentum […] rationem quae rei dubiae faciat fidem.").
[88] C. 30 q. 5 d. post c. 11 ("Cum autem fides dubiae rei nisi testium approbatione vel legitima confessione iudici fieri non valeat […]").
[89] C. 15 q. 5 c. 2 ("Sole ergo spontanea confessio, et canonicus numerus, vel qualitas testium […] clericum privat proprio gradu.").

that sentence cannot be passed unless the defendant has confessed or been duly convicted: "We cannot pass sentence against anyone unless he has either been convicted or has voluntarily confessed."[90] In another passage, a *dictum* of Gratian distinguishes clearly between a defendant who has been "accused and convicted before a judge" (*coram iudice accusatus et convictus*) and a defendant who has "himself made an in-court confession about himself" (*in iure ipse de se fuerit confessus*).[91] Other fragments draw a similar distinction.[92]

One further complication is presented by several *Decretum* passages that, unlike the fragments of the *Corpus iuris*, discuss the conditions under which an acceptable confession may be made. Several *Decretum* fragments hold that a confession must be free and "spontaneous;" the use of torture to extract a confession is expressly forbidden.[93] The confession must also refer to the conduct of the confessing party himself, and the confession of one accused should not be used without corroboration against another accused.[94]

5.1.2 Confession in the Twelfth-Century Glossators

I have so far been discussing the different meanings of *confessio* and in particular the conflicting "waiver" and "evidentiary" senses of the term in the inherited Roman and canon sources. For all this variety, however, our main point should remain clear: these sources generally presupposed that "confession" meant an admission of the entire claim of the

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[90] C. 2 q. 1 c. 1 ("Nos in quemquam sententiam ferre non possumus, nisi aut convictum, aut sponte confessum.").
[91] C. 24 q. 3 d. ante c. 1.
[92] See, e.g., C. 2 q. 1 c. 10 ("non convictum neque confessum"); C. 11 q. 3 c. 36 ("convictis vel confessis"); C. 15 q. 5 c. 2 ("[…] unde si examinante episcopo causam presbiteri vel diaconi non fuerit per testium approbationem presbiter vel diaconus forte convictus, non est scelus episcopo legitime manifestum, nisi sua sponte ipsum confiteatur […]"); C. 15 q. 8 c. 1 ("Quod si de his non fuerit confessus, nec aliquibus potest manifeste convinci, huic ipsi potestas de se est committenda."); C. 17 q. 4 d. ante c. 30 ("et convictus, sive confessus").
[93] See C. 2 q. 5 c. 20; C. 15 q. 5 c. 2; C. 15 q. 6 c. 1.
[94] See C. 3 q. 9 c. 1, c. 3; C. 3. q. 11 c. 1; C. 15 q. 3 d. post c. 5; C. 15 q. 5 c. 2.

opponent. The term did not ordinarily encompass parties' admissions of individual facts at issue in a dispute.

This sense of the word *confessio* was carried over into discussions of confession among the twelfth-century jurists. Here too, as in the inherited sources, "confession" continued to mean the full admission of the opposing party's claim. The glossators' main efforts were devoted to determining the extent to which a party confession was subject to evaluation as evidence at all. Faced with conflicting "waiver" and "evidence" theories of confession, both attested in the *Corpus iuris* and *Decretum*, the twelfth-century jurists largely settled, with some qualification, on the waiver theory.

The earliest glossators concluded from their reading of several fragments of the *Corpus iuris* that a party's confession was generally binding on the fact finder and not subject to judicial evaluation. The confession was thus not subject to judicial evaluation as a means of proof. Martinus cites several of the relevant *Corpus iuris* fragments together in a gloss on Dig. 9.2.25.2, a passage of Ulpian. The Roman text concerns Aquilian liability, the area of the Roman law of delict that regulates compensation for fault-based damage to property.[95] This fragment deals in particular with delictual liability for the killing of a slave or four-footed animal[96]:

> It should be observed that in this cause of action, since the action is granted against a party who confesses, a judge is granted not for the purpose of adjudicating the matter in controversy, but for assessing

[95] See generally Max Kaser, *Das römische Privatrecht*, vol. 1, *Das altrömische, das vorklassische und klassische Recht*, 2nd ed. (Munich: Beck, 1971), 161–62, 619–21.
[96] See Otto Lenel, *Palingenesia iuris civilis: Iuris consultorum reliquiae quae Iustiniani Digestis continentur ceteraque iuris prudentiae civilis fragmenta minora secundum auctores et libros* (Leipzig, 1889), 2:522–26.

> damages: for the adjudicator has no role with respect to confessing parties.[97]

The Bolognese jurist Martinus's gloss both confirms and expands the reach of the Roman principle beyond Aquilian liability:

> So that, before [the judge] takes cognizance of the cause, damages should be awarded and [the judge] should also proceed to pronounce condemnation, as below in Dig. 42.2.3 and Dig. 48.3.5; there, however, [the passage] discusses a case in which there is a criminal proceeding.[98]

Martinus confirms in the gloss that the judge in this form of action must proceed to an award of damages (*ut* […] *dampnum sit datum*) once a party has confessed without further evaluation. The glossator also extends the principle to other forms of action, including criminal proceedings. He first relates the principle in Dig. 9.2.25.5 to Dig. 42.2.3, a fragment reporting an opinion of the Roman jurist Julian concerning the law of inheritance.[99] Julian holds in that passage that a party who admits he is under a duty to convey a testamentary legacy to a third party is to be "in every case" (*omnimodo*) condemned as liable for the legacy, even if the legacy never in fact existed under the will.[100] Martinus also recognizes that the principle applies to criminal proceedings. He cites Dig. 48.3.5, a fragment of the Roman jurist Venuleius Saturninus: "If the defendant confesses, he must be cast into public chains

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[97] Dig. 9.2.25.5 ("Notandum, quod in hac actione, quae adversus confitentem datur, iudex non rei iudicandae, sed aestimandae datur: nam nullae partes sunt iudicandi in confitentes.").
[98] Gl. ad Dig. 9.2.25.5 v. "iudicandae," in Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 1408, fol. 107vb ("ut prius de causa cognoscat dampnum sit datum, nec ne condempnare mandet, ut i. de confessis l. iii [Dig. 42.2.3] et ut i. de custo(dia) reor(um), si confessus [Dig. 48.3.5] contra. ibi loquitur eo casu quando criminaliter agitur.").
[99] For the context, see Lenel, *Palingenesia*, 1:1165.
[100] See Dig. 42.2.3 ("Iulianus ait confessum certum se debere legatum omnimodo damnandum, etiam si in rerum natura non fuisset et si iam a natura recessit, ita tamen, ut in aestimationem eius damnetur: quia confessus pro iudicato habetur.").

until sentence is pronounced against him."[101] Martinus apparently interprets the passage to require that a criminal defendant who confesses be sentenced without further judicial process.

Other early glosses are consistent with Martinus's gloss on Dig. 9.2.25.5. Like Martinus, an anonymous marginal chain of "allegations" (*allegationes*, references to the *Corpus iuris*) from the second half of the twelfth century implies that the same binding effect of party confessions applies in both civil and criminal proceedings. One of the allegations glossing Dig. 48.3.5, the fragment on criminal proceedings of Venuleius Saturninus, cross-references Dig. 42.2.3, the opinion of Julian on the law governing admission of liability to a third party for a testamentary legacy.[102]

A gloss attributed to Martinus's contemporary Bulgarus similarly gives no suggestion of limitations on the binding effect of party confessions. Bulgarus glosses Cod. 7.59.1, a constitution of Antoninus Pius. The emperor holds: "It is resolved that those who confess in court are deemed equivalent to those adjudged [i.e., adjudged debtors]. You wish therefore without justification to be released from your confession, when you are compelled to pay."[103] Bulgarus explains: "With the judge sitting for the tribunal [but] not taking full cognizance [of the case]."[104] Once the defendant has confessed, in other words, a judge still presides over the proceeding but pronounces sentence without a full examination of the facts (*non cognoscente de plano*) that had been in dispute.

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[101] Dig. 48.3.5 ("Si confessus fuerit reus, donec de eo pronuntietur, in vincula publica coiciendus est.").
[102] Gl. ad Dig. 48.3.5, in Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 11156, fol. 103vb ("supra de confes[sionibus]"). On the manuscript, see Gero Dolezalek, "Der Glossenapparat des Martinus Gosia zum *Digestum novum*," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 84 (1967): 255–56.
[103] Cod. 7.59.1 ("Confessos in iure pro iudicatis haberi placet. Quare sine causa desideras recedi a confessione tua, cum et solvere cogeris.").
[104] Gl. ad Cod. 7.59.1 v. "iure" (?), in Padua, Biblioteca universitaria, MS 688, fol. 151ra ("Iudice sedente pro tribunali, non cognoscente de plano.").

One rationale for treating a party's confession as a binding waiver of all further process was given by a later twelfth-century glossator, Pillius.[105] Pillius's main treatment of confessions appears in the second book of his *Libellus disputatorius*, a systematic, though incomplete, teaching manual of Roman-law procedure drafted in two recensions, of which the second was complete by the mid-1190s.[106] Like his predecessors, he holds that in-court confessions usually bind the confessing party: to the question, "must confessions made *in iudicio* generally be held definitive?" the glossator answers, "I reply, yes."[107] This is simply because an in-court confession is intrinsically persuasive, he argues. "[N]o one proves confessions: neither the confessing party nor his adversary. The adversary does not because the confessing party has sufficiently proven on his behalf […]. The confessing party does not because credence is given to him [when he confesses] against himself […]."[108] The binding effect of confessions derives, according to Pillius, from the natural persuasiveness of a defendant's voluntary, in-court statement against interest (*quia creditur ei contra se*).

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[105] On Pillius, see Ennio Cortese, "Pillio da Medicina," in *Dizionario biografico degli giuristi italiani (XII–XX secolo)*, ed. Italo Birocchi et al. (Bologna: Il mulino, 2013), 2:1587–90; Lange, *Römisches Recht*, 1:226–29; Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. 4, *Das zwölfte Jahrhundert*, 2nd ed. (Heidelberg, 1850), 316–27.

[106] See Pillius, *Libellus disputatorius*, proemium, ed. in Annalisa Belloni, *Le questioni civilistiche del secolo XII: Da Bulgaro a Pillio da Medicina e Azzone* (Frankfurt am Main: Klostermann, 1989), 54 (Pillius's account of the composition of the text); Lange, *Römisches Recht*, 1:230 (first recension 1172–92, second ca. 1195); Jürgen Meyer-Nelthropp, "Libellus Pylei disputatorius liber primus" (Dr. iur. diss., Universität Hamburg, 1958), III (second recension ca. 1192; with literature); Emil Seckel, *Distinctiones glossatorum: Studien zur Distinktionen-Literatur der romanistischen Glossatorenschule, verbunden mit Mitteilungen unedierter Texte* (Berlin: Liebmann, 1911), 368 (first recension ca. 1192, second ca. 1195). I refer in the text to the second recension.

[107] Pillius, *Libellus disputatorius*, lib. 2, in Vienna, Österreichische Nationalbibliothek, MS Cod. 2157, fol. 72rb ("unde uidendum est numquid confessiones in iudicio facte seruande sunt omnino. Respondeo, utique.").

[108] Id., fol. 72rb ("Confessiones autem nemo probat nec confitens nec aduersarius. aduersarius non, quia satis probauit pro eo confitens, ut C. de transac. cum te [Cod. 2.4.5?]. confitens non, quia creditur ei contra se, ut. ff. de inter. act. de etate §. 1 [Dig. 11.1.11.1].").

To sum up, then: the early glossators thus decided to reconcile conflicting meanings of *confessio* in the Roman sources by accepting the primacy of the waiver theory, rather than the evidence theory, of confession, for civil as well as criminal proceedings.

5.1.3 Qualification: Mistake of Fact

In saying that the twelfth-century jurists generally accepted the primacy of the waiver theory of confession, I do not mean to suggest that the glossators allowed for *no* judicial evaluation of party confessions whatsoever. On the contrary, the twelfth-century jurists did envisage some circumstances in which a judge would have to evaluate whether the purported facts underlying a confession had really happened. But the jurists' treatment still presupposed the idea of confession that we have been discussing: a confession was an admission of the full claim of the opponent.

The most important of these circumstances was the case of a confession that was "false" because the confessing party had made a mistake of fact: something that he or she had thought was true was in fact untrue. The mistake-of-fact problem arose from a fragment of the *Digest* in which the Roman jurist Ulpian explains that a party is deemed not to have confessed if he or she makes a mistake of fact: "He who makes an error does not admit [liability], unless he made an error of law."[109]

Ulpian's holding was developed in detail in a gloss on the fragment attributed to the tweflth-century glossator Martinus. Martinus distinguishes[110] as follows:

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[109] Dig. 42.2.2 ("Non fatetur qui errat, nisi ius ignoravit."). For context, see Lenel, *Palingenesia*, 2:778.

[110] On the *distinctio* genre, of which this gloss is an example, see Hermann Lange, *Römisches Recht im Mittelalter*, vol. 1, *Die Glossatoren* (Munich: Beck, 1997), 134–38; Peter Weimar, "Die legistische Literatur der Glossatorenzeit," in *Handbuch der Quellen und Literatur der*

> He who makes a confession confesses either the truth or a falsehood. He who confesses the truth is wholly bound by his confession. For those who confess are seen as condemned by their own statement. He who confesses a falsehood either confesses that on account of which he is under an obligation or that on account of which there is litigation with someone else. He who confesses that on account of which no one is under an obligation is not bound by his confession. He, however, who confesses that on account of which there is litigation with someone else does so either knowingly or unknowingly. If knowingly, he does so either fraudulently or not fraudulently. If fraudulently, he is bound by his confession. If not, as perhaps he spoke in jest, he is still bound, but he must be absolved of liability by the praetor. He who confesses unknowingly confesses either law or fact. If law, he is not granted relief. If fact, he is not deemed to have confessed, and therefore no relief is granted.[111]

Martinus reads Ulpian's opinion, which permits a party who has made a mistake of fact to retract his confession, as an implicit general authorization to the fact finder to evaluate the truthfulness of a party's confession objectively, as evidence rather than as a waiver. To decide whether a party "is bound" (*tenetur*) by a confession, the fact finder in Martinus's schema must necessarily determine whether the party has confessed *verum* or *falsum*. Yet the glossator also tacitly acknowledges a potential conflict between the general principle that a party's confession is binding and terminates a judicial proceeding and the principle, expressed here and in Ulpian's text, that a confession made in mistake of fact is not an

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neueren europäischen Privatrechtsgeschichte, ed. Helmut Coing, vol. 1, *Mittelalter (1100–1500): Die gelehrten Rechte und die Gesetzgebung* (Munich: Beck, 1973), 142–43.

[111] Gl. ad Dig. 42.2.2 v. "errat" ("deerat"), in Bamberg, Staatsbibliothek, MS Msc. Jur. 18 (antea D. I. 8), fol. 54rb ("Qui confitetur, aut uerum aut falsum. qui uerum, omnino ex confessione sua tenetur. Propria enim sententia condempnati uidentur. Qui falsum, aut id confitetur cuius nomine obligatus sit, aut id cuius nomine cum alio sit actio. qui confitetur id cuius nomine nemo sit obligatus, non tenetur ex sua confessione. qui uero id confitetur cuius nomine cum alio sit actio, uel sciens uel ignorans. Si sciens, aut dolo aut sine dolo. Si dolo, tenetur. si non, quod forte dixit ludendo, tenetur quidem, set absoluendus est a pretore. Qui ignorans, aut ius aut factum. si ius, non subuenitur. Si factum, non uidetur confessus, ideoque non subuenitur."). For other manuscript sources, see Gustav Pescatore, "Verzeichnis legistischer Distinktionen mit Angabe des Verfassers," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 33 (1912): 501 (listing manuscript sources).

admission. He holds in this passage that a person who has confessed in mistake of fact "is deemed not to have confessed" (*non videtur confessus*). The general principle (the waiver theory of confession) is preserved by means of a legal fiction, indicated by the verb *videor* "to seem, to be deemed," that a mistaken confession is not a confession at all. Martinus uses a related technique of reconciliation when he holds that a party who makes an untruthful confession in jest "is still bound" (*tenetur quidem*) under the law but "must" nonetheless "be absolved of liability by the praetor" (*set absolvendus est a pretore*). Here the glossator preserves the general principle of the binding effect of a party confession by invoking the power of the magistrate in Roman law to derogate from the strict law in order to do equity in a judicial proceeding.[112]

Martinus's solution to the problem of false confessions won acceptance among his successors. In a passage[113] discussing the effect of false confessions, the glossator Wilhelmus de Cabriano[114] follows Martinus closely. "If a person indeed confesses in a judicial proceeding," Wilhelmus distinguishes, "he confesses either the truth or a falsehood. If the truth, he is treated as if he had been declared liable; if a falsehood, distinguish whether the falsehood [was] one by virtue of which a cause of action did not lie, in which case the person is not bound [by his confession], or one by virtue of which another person was bound." Wilhelmus continues, distinguishing whether a party made a false confession because of a

[112] On this distinction between the *ius civile* and the praetorian *ius honorarium*, see generally Kaser, *Das römische Privatrecht*, 1:205–8.
[113] On the *casus* genre, of which this passage is an example, see Lange, *Römisches Recht*, 1:140–41; Weimar, "Die legistische Literatur der Glossatorenzeit," 143.
[114] On Wilhelmus, see Lange, *Römisches Recht*, 1:204–6; Savigny, *Geschichte*, 4:237–39; Tammo Wallinga, "Guglielmo da Cabriano," in Birocchi et al., *Dizionario*, 1:1087–88.

joke, fraud, mistake of fact, or mistake of law, reaching the same conclusions as his predecessor Martinus.[115]

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We have now explored the twelfth-century jurists' treatment of the law of confessions at some length. Other problems raised by the law of confessions were also the subject of discussion. The glossators discussed whether a confession made out of court could have the same legal effect as a confession made in court.[116] They also discussed the circumstances under which a party could retract an earlier confession.[117] But through all this juristic discussion, our earlier point remains: the glossators, like their ancient Roman predecessors,

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[115] See Wilhelmus de Cabriano, *casus* ad Cod. 7.59.1, in Tammo Wallinga, ed., *The "Casus Codicis" of Wilhelmus de Cabriano* (Frankfurt am Main: Klostermann, 2005), 549 ("Si quidem in iudicio confitetur aut confitetur uerum, aut falsum. Si uerum, pro dampnato habetur; si falsum, distingue an id falsum cuius nomine non erat actio, quo casu non tenetur, aut id cuius nomine alius tenebatur. Et hic refert an per iocum an dolo malo. Si quidem per iocum, tenetur, set a pretore iuuatur. Si uero dolo malo, aut sciens aut ignorans. Si sciens, tenetur; si ignorans, aut factum: non tenetur; aut ius: et tenetur. Ius ignorat: puta est confessus se occidisse cum filius suus occiderat; credebat tamen se teneri nomine filii, etiam in maleficio. Hic omnimodo tenetur, ut ff. ad l. Aquil. existima<tur> Hoc apertius [Dig. 9.2.24].").

[116] See, e.g., gl. ad Cod. 7.59.1, in London, British Library, MS Harley 5117, fol. 168va ("Si debitor confessus fuit de debito, uel de aliis rebus coram uicinis et amicis. pro eodem habetur. ac si coram iudice. uel apud magistrum census confessus fuerit."); see also Placentinus, *distinctio* ad Cod. 7.59.1, in Gustav Pescatore, "Distinktionen des Placentinus: Ms. Par. 4603," in *Miscellen: (No. I–XIII.)* (Berlin, 1889), 50–53.

[117] See, e.g., gl. ad Cod. 7.59.1 v. "desideras," in Paris, Bibliothèque nationale de France, MS lat. 4536, fol. 163va, ed. in Antonio Padoa-Schioppa, "Le *Questiones super Codice* di Pillio da Medicina," *Studia et documenta historiae et juris* 39 (1973): 276 ("Quid est ergo quod dicit licere responsi confesso penitere, ut ff. de interro. de etate § ult. [Dig. 11.1.11.12]? Respon. illud est intelligendum ante litem contestatam, hic autem postea; vel hic volebat penitere cum captione actoris, quod non licebit ut et ibi dicitur; vel quod est verius illud est intelligendum de illa confessione per quam non firmatur intencio actoris, veluti si confiteretur se possidere vel in potestate habere bona, heredem esse et similia. Sed numquid hoc etiam in criminalibus intelligendum est? Respon. non ut. Sed contra ut infra de penis qui sententiam [Cod. 9.47.16]. Ibi respon.").

understood *confessio* to be a full voluntary admission of a claim, not a statement against interest regarding some individual fact in dispute.

5.2 Interrogatories

So much for the first impediment to using the concept of *confessio* as a means of proof: that the dominant legal theory of confessions treated a party confession as an admission of the opposing party's entire claim. There was also a second doctrinal impediment to using parties as sources of proof: namely, that there was no obvious mechanism for inducing a party to make a confession, or any other statement against interest for that matter.

There was admittedly some authority in Roman law for empowering the judge to question a party about matters of fact. The clearest authority for this power could be found in the *Digest*. Several fragments collected in the title "On interrogatories made in the proceeding before the judge and on interrogatory actions" (*De interrogationibus in iure faciendis et interrogatoriis actionibus*) implied that the judge could put factual questions to a party.[118]

The glossators understood this questioning power to be quite limited, however. The prevailing view of the twelfth-century jurists was expressed in a lengthy gloss of Martinus.[119] The glossator begins by listing the circumstances under which a judge may conduct interrogatories before joinder of issue.[120] He enumerates eleven types of question that can be asked, assembling authority from different fragments of the *Digest* title *de interrogationibus in iure faciendis et interrogatoriis actionibus* to compile the list. According to Martinus, authorized questions include whether the defendant is an heir of the decedent debtor, what

[118] Dig. 11.1.
[119] Gl. ad Dig. 11.1.1 pr. v. "heres sit," in Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 1408, fol. 126v.
[120] Id. ("Isti sunt interrogationes que sunt ante litem contestatam […].").

share of the decedent's property the defendant inherited, whether the defendant possesses property in dispute in his capacity as heir, if so what share of the property he possesses, and several other related questions.[121] Martinus also lists a twelfth "general case." The judge may pose a question on any subject "whenever equity moves" him, he holds,[122] relying on a fragment of Ulpian.[123] All of these questions were to be asked only before joinder of issue, and only for settling certain types of preliminary question; most of these questions concerned inheritance disputes only.

Martinus's restricted approach to "interrogatories" made before joinder of issue remained the *communis opinio* among later jurists. The jurist Azo, expressing the common view around the turn of the century, agrees with Martinus that the *Digest* title *de interrogationibus in iure faciendis et interrogatoriis actionibus* permits the judge to pose a circumscribed set of factual questions to the defendant before joinder has taken place. He also adopts Martinus's canon of eleven types of question, plus the residual category of questions that a judge may ask when "equity moves him."[124]

The approach taken to judicial interrogation of parties in procedural manuals written up through the 1190s was almost as restrictive. These manuals regularly acknowledged that the duty of the judge in a proceeding included an obligation to elicit information from the parties by questioning. But that duty only extended to ensuring that each party had had a full

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[121] Id. ("[…] an heres sit . ut hic. et t. e. l. qui interrogatus [Dig. 11.1.5]. m[.] pro qua parte heres sit. ut. t. e. l. qui interrogatus [Dig. 11.1.5]. m. […] an heres possideat. m. pro qua parte possideat. ut. t. e. l. non aliendum [Dig. 11.1.10] et l. …… § ult. […]").
[122] Id. ("Isti sunt .xi. casus in quibus ante litem contestatam facienda est interrogatio predictis modis est. et xii. qui generalis est ut quandocumque equitas iudicem mouerit fieri debeat. ut. t. e. l. penult [Dig. 11.1.21].").
[123] See Dig. 11.1.21 ("Ubicumque iudicem aequitas moverit, aeque oportere fieri interrogationem dubium non est.").
[124] See *Summa Azonis* […] (Venice, 1584), rub. *De interrogationibus in iure faciendis, et de interrogatoriis actionibus*, at col. 1166, nos. 3–4.

opportunity to present its case. By implication, judges were not expected to question the parties about disputed matters of fact.

Discussion along these lines can be found in procedural manuals produced by both Roman lawyers and ecclesiastical lawyers. Among legist manuals, the midcentury Bolognese text *Tractaturi de iudiciis primo de preparatoriis iudiciorum* affirms that the *officium iudicis* includes a duty to question the parties repeatedly in order to make sure that each party has had an opportunity to argue his case in full, "lest the parties complain that the judge hindered them."[125] The slightly later French text *Si quis de re quacumque* states the *officium iudicis* in very similar terms, requiring the judge to make "full inquiry" into the case and an imposing a requirement "to question both parties numerous times to make sure that they do not wish to add anything."[126] At least one manual, the legist text *Videndum est quis sit ordo*,[127] explicitly stresses the desirability of obtaining a defendant's confession through questioning. While setting forth the order of phases in a proceeding, the author of *Videndum est quis sit ordo* explains that once joinder of issue has taken place, the judge should conduct "repeated questioning" (*frequens interrogatio*) to induce one or both parties to make confession. After joinder of issue, the author says,

> There follows in the progression a repeated questioning by the judge, since he must question the parties closely in order that he may also

[125] Gross, *Incerti auctoris ordo*, tit. 5 (*de judiciiis*), § 8, at 99–100 ("[… J]udex debet interponere partes suas et ab utraque parte perquirere, si plus allegare velint, et hoc sepius, ne possint conqueri, ipsum eis esse impedimento.").
[126] *Placentini iurisconsulti vetustissimi de varietate actionum libri sex*, lib. 4, tit. 15 (*de officio iudicis*), at 103 ("[P]raeterea qualitate plena inquisitione discussa, utramque partem saepius interrogare debebit, nequid addere desiderent, ut C. de iudi. l. Iudiciis [Cod. 3.1.9].").
[127] The text was probably composed in France in the second half of the 1180s; the first part of the text relies heavily on Placentinus's *Summa Codicis*. See Fowler-Magerl, Ordo iudiciorum, 94–95 (date and place of composition and influence of Placentinus), 294–96 (text).

> elicit the truth by means of their confession. For as the law[128] says: cases' merits are disclosed by the declaration of the parties.[129]

Similar language can be found in *ordines* that rely primarily on canon-law authorities. The midcentury English text *Quoniam ea que in civilibus negotiis* speaks of the duty of the judge in nearly identical terms, stating that the judge must "question each party numerous times whether he wishes to add something new or to change something […]."[130] The twelfth-century Rhenish text *Hactenus magister Gratianus egit de personis*, dating to after 1167,[131] similarly affirms that the *officium iudicis* includes a duty "frequently to question the parties."[132] The text *Iudicandi formam in utroque iure* directs the judge "frequently to question the litigants"[133] and cites for authority a passage of the *Decretum* in which the judge is instructed to submit the parties to close questioning "lest by chance anything remain overlooked."[134]

To summarize: in addition to lacking a working notion of "confession" that could be used to exploit parties as sources of evidence, the twelfth-century jurists lacked in any case an easy mechanism for eliciting evidence about disputed matters of fact from the parties. The

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[128] The words after the colon are an imperfect borrowing from Cod. 8.5.2 ("quia negotiorum merita partium adsertione panduntur").
[129] Fowler-Magerl, Ordo iudiciorum, 295 ("Sequitur in progressu iudicis frequens interrogatio. Crebro enim partes interrogare debet, ut possit etiam earum confessione veritatem elicere, quia ut dicit lex: in merita causarum assertione partium panduntur.").
[130] Hänel, *Incerti auctoris ordo*, tit. *de officio iudicis*, at 41 ("Iudices oportet inprimis rei qualitatem inquisitione plena discutere, exinde utramque partem saepius interrogare, utrum quid novi velit, addere vel aliquid mutare […].").
[131] Fowler-Magerl, Ordo iudiciorum, 87 (attribution), 290–93 (text).
[132] Id. at 291 ("Iudicis enim officium est de causa cognoscere, absentes citare, partes frequenter interrogare, inducias prorogare et cognita causa partibus, idest actore et reo, sententiam ferre.").
[133] Id. at 274 ("Cognitoris autem litis officium est, frequenter litigantes interrogare utrique parti patienciam se mutuo consulendi sicque invicem respondendi prestare […].").
[134] C. 30 q. 5 c. 11, quoted in id. ("Frequenter interrogare oportet, ne aliquod pretermissum forte remaneat, quod adnecti conveniant.").

glossators recognized a limited power to question parties through the use of "interrogatories" (*interrogationes*), but this power was restricted to a small enumerated list of subject matters. Nor was the power to question parties that the writers of early procedural manuals accorded to judges much more expansive; that power extended only to "interrogation for clarification" (*interrogatio ad clarificandum*), questioning aimed at inducing the parties to ventilate their arguments as fully as possible.

6. CONCLUSION

I began in part 2 by giving a summary account of the law of procedure in the mid-twelfth century as evidenced by the letter *Karissimo amico et domino A.* of Bulgarus. I next showed in part 3 that this procedure raised a problem for the twelfth-century jurists: the two principal means of proof, witness testimony and documentary evidence, were perceived to offer insufficient evidence in many cases. I therefore explored in parts 4 and 5 three potential solutions to the problem of proof insufficiency: argumentative techniques derived from the ancient rhetorical tradition (part 4); party oaths (part 4); and party confessions (part 5).

Overall, I have argued in this chapter that the twelfth-century jurists recognized a recurring problem of "insufficiency of proof," cases in which a plaintiff who seemed to have a meritorious case was unable to bring forward a satisfactory quantity of witness testimony or documentary evidence to prove his or her claim; but that the jurists lacked an appropriate doctrinal mechanism for exploiting perhaps the most valuable sources of evidence, the *parties themselves*.

The doctrinal discussion in this chapter will serve as the background for the developments in the law of proof in legal practice that will be examined in chapter 2.

CHAPTER 2

THE PARTY AS A SOURCE OF PROOF IN TWELFTH-CENTURY PRACTICE

1. INTRODUCTION

In the previous chapter I surveyed the law of proof in twelfth-century Roman-canon procedure. In my account, the twelfth-century jurists were aware that the two preferred means of proof, witnesses and documents, provided insufficient evidence in some cases; they accordingly explored the use of other means of proof, including in particular means of proof that relied on the parties themselves, arguably the most valuable sources of evidence; but the two available means that relied on the parties as sources of proof—the party oath and the confession—raised special theoretical and practical difficulties: the oath was marginal within the rhetorically influenced, argument-centered Roman understanding of proofs, whereas the confession was understood to apply only to the entire claim of the opposing party, not to individual facts, and there was in any case no obvious doctrinal mechanism for eliciting a confession.

In contrast to the previous chapter, which explored twelfth-century procedural theory, in this second chapter I explore the ways in which courts and arbitral panels in northern and central Italy, the core territory of the medieval renaissance of Roman law and the new Roman-canon procedure, made use of parties as sources of proof in legal practice in the twelfth century and at the turn of the thirteenth century. I suggest that two broad approaches were taken in practice. The first, older approach, exemplified by the practice of the courts of Milan, was essentially court-controlled: in doubtful cases in which witness and documentary proof were insufficient, it required the adjudicator to resolve doubt by choosing one party to

swear an oath that confirmed the truth of some or all of the claims he or she had made at trial. The alternative, newer approach, which I suggest was likely pioneered in Pisa and other cities of Tuscany and which then rapidly spread elsewhere in Italy, was essentially party-controlled: a party would submit factual assertions to or ask factual questions of the opposing party, who was required to respond, regularly under oath. I suggest that the rapid dissemination of this new, party-controlled—or to be more precise, opponent-controlled—method was likely due at least in part to its inherent informational advantage over the older approach: because parties inevitably knew more about their dispute than the adjudicator, they were on average better positioned than the adjudicator to frame probative lines of factual inquiry.

In what follows, I first give in part 2 an account of the older, adjudicator-controlled approach to the use of parties as sources of proof, taking the courts of Milan as my primary case study. In part 3 I show the emergence of an alternative, opponent-controlled approach in the courts of Pisa. I then describe the dissemination of this new approach elsewhere in Italy and in the doctrinal literature in part 4.

I will explore the doctrinal consequence of this development in practice—rules of evidentiary admissibility—in chapter 3.

2. THE PARTY AS A SOURCE OF PROOF: THE ADJUDICATOR-CONTROLLED APPROACH

2.1 Milan

I will begin by describing the adjudicator-controlled approach, using the courts of Milan as my main example.

We saw in chapter 1 that Bulgarus endorsed the use of a party oath as a means of proof, at the judge's discretion, in any case in which an "insufficiency of proofs" (*inopia probationum*) left the plaintiff unable to establish his or her case. More than any other northern or central Italian commune, Milan made the party oath a cornerstone of its communal court procedure in the twelfth century.[1]

Judged from the written record, the twelfth-century communal courts of Milan followed at least the rough outlines of the procedure that we saw outlined in Bulgarus's letter. In a typical format[2] for twelfth-century Milanese court decisions, the record begins with a protocol with the day, month, and location of the decision. The text follows, announcing the sentence and naming both the members of the deciding panel and the parties. It next announces the litigation ("for the dispute was as follows" (*lis enim talis erat*) or similar) and summarizes the parties' arguments. As in Bulgarus's letter, the plaintiff submitted a claim; the defendant ordinarily responded to the plaintiff's claim with a confession or complete or partial denial. The parties then usually presented proofs in the form of witness testimony and documentary evidence. The burden of proof must have lain at least initially on the plaintiff. But the precise nature of this burden is not clear from the record. In most cases both the plaintiff and defendant offered proof, the ostensible defendant sometimes presenting proof before the plaintiff. Occasionally, too, a judicial panel cited a defendant's failure to present any proof when issuing judgment for the plaintiff, suggesting that both parties may have been

[1] On proof generally in the twelfth-century Milanese cases, see Antonio Padoa-Schioppa, "Aspetti della giustizia milanese dal X al XII secolo," in *Atti dell'11o congresso internazionale di studi sull'alto medioevo: Milano, 26–30 ottobre 1987* (Spoleto: Centro italiano di studi sull'alto medioevo, 1989), 1:532–41.

[2] For a more detailed diplomatic description of the Milanese records, including a number of variations, see Cesare Manaresi, ed., *Gli atti del comune di Milano fino all'anno MCCXVI* (Milan: Capriolo e Massimino, 1919) [hereinafter Manaresi], cvi–cxxi.

at least informally expected to substantiate their respective positions in litigation.[3] In any case, following the presentation of proof, the proceeding ordinarily ended with the issuance of a definitive sentence by a panel of communal judges, called "consuls" (*consules*). An eschatocol closed the record with the year, indiction, a list of witnesses to the proceeding, and the subscribed names of the panel members and notary responsible for drafting the record.

This much as I have described of the Milanese model of procedure seems to follow Bulgarus's pattern with little obvious variation. What is more surprising is the Milanese courts' use of party oaths. The discussion of oaths in Bulgarus's letter implies that the use of a party oath was an exceptional event, a technique that was peripheral to the main means of proof and that was applied only as a last resort. In Milan, quite to the contrary, the party oath was used with great frequency, in some periods of the century seemingly as a matter of routine.

One illustration of the Milanese form of proceeding, with its use of the oath, is a sentence of a panel of communal judges from November 1182. The case record begins by stating the parties' initial claim and answer. The plaintiff in this case claimed from the defendants a tithe of the wheat produced on eight specified tracts of land, asserting that the defendants had taken the tithe for themselves.[4] The defendants answered with a denial, asserting that the plaintiff held no tithe right over the land. The right was instead theirs, they

[3] See, e.g., id., no. 155, at 230 ("[I]psi rustici [i.e., the defendants] super eo quod predictus mansus liber esset seu ceteri nichil probavere.").
[4] Id., no. 129, at 177 ("Postulabat ipse Musso, quatenus iam dictus Arnaldus de Terzago et filii eius dent sibi sub sacramento totam blavam quam habuerunt occasione decimationis de infrascripta terra […].").

said. This was because the tracts belonged not to an area known as Besate, where the plaintiff held tithe rights, but to another area known as Oronno, where the tithe rights were theirs.[5]

Following the pleading phase, the case record reports the parties' proofs and arguments. To substantiate their position, the defendants presented proof in the form of a written court sentence in a prior case in which the land tracts at issue were stated as being part of the area of Oronno, along with the testimony of witnesses; the case record reports, however, that these witnesses "seemed insufficient to the consuls" (*visi sunt consulibus minus sufficientes*). The plaintiff, for his part, countered that whether or not the land tracts belonged to the area of Oronno was of no consequence. He had not been a party to the prior case, he said, and in any event several land tracts adjoining the church at Oronno had been held in earlier litigation to belong to him, so that the mere fact that land was in Oronno did not mean that the tithe rights belonged to someone else. Furthermore, he argued, whatever the original status of the land, he and his ancestors had acquired the tithe rights by prescription. He then produced "many suitable witnesses" (*multis testibus* […] *idoneis*) to that effect.[6]

The November 1182 case record closes with a report of the Milanese judges' decision. The panel decided for the plaintiff. But instead of issuing sentence immediately, the panel first ordered each party to swear an oath. The plaintiff was instructed to swear that the

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[5] Id. ("E contra prefatus Arnaldus predictam decimam non ad iam dictum Mussonem pertinere, quia non de territorio Besate, sed de territorio loci qui fuit antiquitus Oronno, cuius territorii universitas decimationis ad se pertinabat, fore respondebat […].").
[6] Id. at 178 ("Musso vero, quod decimatio territorii de Oronno sit predicti Arnaldi non confitebatur, et etiam dicebat quod prenominata sententia non debebat ei nocere, quia res inter alios acta fuerat et maxime cum plures campi iuxta ecclesiam de Oronno constituti inventi sint a consulibus qui ipsam discordiam viderunt de decimatione prefati Mussonis, prout etiam ipse Arnaldus fuit professus. Allegabat insuper Musso quod etsi iam dicti campi deventi in territorio iam dicti fuissent inventi, tamen de sua decimatione sunt, quia per longissimum tempus suo nomine et nomine suorum antecessorum fuerat collecta; quod multis testibus probavit idoneis.").

account he presented at trial was in fact true. The presiding judge directed "that he should swear that the tithe of the aforenamed pieces of land is his, and that it does not belong in whole or in part to the aforesaid [defendant]; and immediately he did so swear." One of the defendants was then ordered to swear that he would comply with the panel's decision.[7] The proceeding was then closed.

The case that I have just described provides a typical example of the use of oaths in Milanese procedure. There is no lack of other means of proof presented in the proceeding. The defendant presented documentary evidence, and both sides offered witness testimony to the panel. The panel must largely have been persuaded by the proof offered by the plaintiff, whereas the defendants' proofs were expressly found "insufficient" (*minus sufficientes*). The panel nonetheless chose to compel the plaintiff to commit himself by oath to the account he had given in the case, confirming the proof that it had already reviewed.

Oaths of the type found in the November 1182 case are a major feature of Milanese procedure. Of ninety-one complete case records of first-instance proceedings decided by the Milanese communal courts in the period from 1138 (the date of the earliest decision) to the end of the twelfth century, I read forty-eight as reporting that an oath was at least offered to one of the parties.[8]

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[7] Id. ("His ita peractis, tunc predictus Stephanus iusiurandum detulit predicto Mussoni ut iuret decimam prenominatarum terrarum petiarum terre suam fore, nec ad iam dictum Arnaldum in toto vel in parte pertinere; qui statim sic iuravit; et illico Stephanus iurare fecit Arnaldum ut totam illam quam collegerat huius anni grossi et minuti de predictis petiis blavam nomine decime det et consignet predicto Mussoni vel suo misso infra quindecim dies in loco Besate, et iussit eidem Arnaldo ut de ipsa decimatione predictorum camporum amplius se non intromittat, sed Mussonem quiete ipsam colligere permittat.").

[8] Id., nos. 5, 7–8, 11–20, 22–23, 25–29, 32, 47, 71, 80, 84, 90, 92, 97, 101, 108, 114, 121, 125–26, 129, 149–50, 157, 164, 166, 174, 181, 189, 193, 195, 205, 210, 224.

These cases are not all uniform. Sometimes the parties are not reported as presenting any proofs at all. In such cases, the oath apparently replaced all other means of proof. Thus in one case, from December 1188, the parties may have agreed that one of them would take an oath before a judge to decide the case. In that case, the plaintiffs sought damages of one pound four shillings[9] from the defendant for carrying off six of their cattle.[10] The defendant answered by admitting that he had taken the cattle, but he justified his action by explaining that his field warden (*camparius*) had found the cattle doing damage to one of his tracts of woodland and that he had merely impounded the cattle so to ensure that the plaintiffs would make restitution for the damage, "which he declared he was allowed to do."[11] The case record then goes on to report that the plaintiffs administered an oath to the defendant to confirm that he had indeed "discovered the aforesaid cattle" on his land. This agreed oath seems not to have been sufficient for the judge. Before ruling for the defendant, the judge directed the defendant to swear additionally "that he did not treat the cows themselves badly, nor did he retain them fraudulently."[12] The judge appears there to have used the oath to compel the defendant to fill in a gap about the facts of the case.

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[9] The units of account of the Italian communes whose sources we are examining, like the pre-1971 British pound sterling, followed the Carolingian pattern of reckoning value in terms of *librae* (English *pounds*, Italian *libbre*), *solidi* (*shillings*, *soldi*), and *denarii* (*pence*, *denari*) in a ratio of 1:20:240.

[10] Manaresi no. 164, at 238 ("Postulabant predicti Petrinus et Girardinus et item Petrinus quatinus iam dictus Civolla daret eis solidos quattuor pro unoquoque dampno sex boum quos eis abstulit.").

[11] Id. ("E contra ipse Civolla non infitiebatur se predictos boves abstulisse, set dicebat cum sit camparius licite eos tulisse, quia eos in sua comparia inventi dampnum facientes in quodam busco, et eos retinuisse dicebat ut dampnum restituheretur ab eis illico. Quod ei facere licere clamabat.").

[12] Id. at 238–39 ("Hiis ita peractis, et cum iusiurandum detulissent ipsi Petrius et Girardinus et item Petrinus predicto Civolle, ut iuraret se predictos boves in sua camparia invenisse, et ipse sic iurasset, et insuper predicto consule defferente iurasset similiter quod ipsos boves male non tractavit, nec dolose eos retinuit […].") . For another case in which an oath, but no proofs, are mentioned, see id., no. 205, at 290.

In several other cases, both one of the parties and that party's witnesses were instructed by the panel of judges to swear oaths affirming their assertions.[13] Thus in one relatively early case from May 1148, the plaintiff, archpriest of a church, claimed that the church held title to twenty-six disputed tracts of land that were under the control of the defendant. The defendant admitted that five of the tracts belonged to the church, but denied that the others did. He asserted, apparently by way of showing that the land was his, that he collected two *stai* of rent in kind per year from the tracts. The archpriest, for his part, presented witnesses who testified that the church did hold title to the lands and that it held the right to collect certain rents in kind from them. The judicial panel in this case, having heard the witnesses' testimony, directed that two of the archpriest's witnesses should swear oaths that their testimony was true, and that archpriest's lawyer, acting on behalf of the archpriest, should swear that the lands indeed belonged to the church, as the archpriest claimed.[14] The panel then held for the archpriest. Oaths in this and similar cases were not the sole means of obtaining proof, as in the December 1188 case. Rather, they seem to have been used in these cases simply to confirm the proof already presented. Here, for example, the panel directed the archpriest's representative and his witnesses to confirm the arguments and assertions they had made during the proceeding.

Finally, in still other cases, an oath was assigned to one of the two parties but "remitted."[15] In these cases, the party assigned to take the oath declared that he or she was prepared to take the oath, but the opposing party opted to "remit" the oath—that is, indicated

[13] See id., nos. 14–17, 20, 23, 25–26, 71. For discussion of the oath as a "complemento della prova testimoniale" in the Milanese cases, see Padoa-Schioppa, "Aspetti," 535–37.
[14] Manaresi no. 16, at 27 ("His ita auditis, tunc ipse Girardus iudex dixit et iudicavit, si ipsi testes iuraverint sicut testati sunt, et proprietas vel libellaria ipsius ecclesie, ut ipse Filipus dimittat eidem archipresbitero predictam omnem terram.").
[15] See id., nos. 28, 84, 90, 92, 108, 114, 125.

that he or she would accept an adverse judgment without the winning party having to take the oath. A party's readiness to take an oath affirming the truth of his or her claims, and thereby risk eternal damnation for perjury if he or she were lying, must have been sufficiently persuasive in these cases that the losing party, perhaps by agreement with the winning party, was willing to dispense with the oath, and thus also dispense with the danger to the soul of perjury. An example of this type of case is a sentence from November 1181 in which the plaintiffs claimed that the defendant was subject to their feudal jurisdiction by virtue of his residence in a particular area of land; the defendant answered with a denial. The plaintiffs presented documentary proof and witness testimony, whereas the defendant is not recorded as having offered proof at all. The judicial panel, prepared to hold for the plaintiffs, assigned them to take an oath confirming their assertions. The case record then reports, however, that "when they were ready to swear, the aforesaid [defendant] remitted the oath to them. And thus the proceeding was terminated."[16]

I am dwelling on the different ways in which the party oath could be deployed in Milanese procedure so as to make clear how oath taking actually operated. But what is especially striking about the twelfth-century Milanese sources is less the variation itself, and more the sheer frequency with which judicial panels resorted to the oath as a means of resolving problems of proof. The impression one gains from reading Bulgarus's letter is that the party oath was a marginal phenomenon in early Roman-canon procedure. By contrast, in Milanese practice, the oath was a central feature of the local procedure, used in more than half of all extant cases from the twelfth century. Other mechanisms do appear in the sources.

[16] Id., no. 125, at 173 ("[Cum parati] essent iurare, predictus Folchetus eis sacramentum remisit. Et sic finita est causa."). My interpretation of "remission" of oaths is not certain. Charles Donahue, Jr. has suggested to me that *remittere* may refer to the opponent's promise to abide by the oath of the swearing party. Charles Donahue, Jr., email message to author, October 8, 2019.

Among the other means of proof that we saw discussed by the twelfth-century jurists in chapter 1, mention of a presumption of fact occasionally surfaces. For example, in one land dispute from May 1171, the record notes the judicial panel's conclusion that one party's witnesses were "not […] sufficient for full proof, but had seemed suitable enough for a presumption" in that party's favor.[17] The party oath nonetheless predominates. Even in the May 1171 case, the party in whose favor the presumption was raised ultimately also swore, together with her witnesses, an oath confirming the truth of her assertions.[18]

For all the seemingly archaic character of oath taking, moreover, the party oath was by no means irrational, or epistemically worthless. Parties must generally have viewed oath taking as a test that, because of the risk of perjury, was fraught with danger to the soul. The requirement that one take an oath before receiving a favorable judgment thus might well cause some parties to reconsider the truth of their claims. The sense of danger that accompanied oath taking is implicit in those cases in which the losing party "remitted" the oath. Similarly suggestive is one case, from January 1154, in which the presiding judge stated that he would hold for the defendants if they would take the oath; otherwise the oath, and thus also a favorable judgment, would be offered to the plaintiff. Perhaps out of fear of perjuring themselves, the defendants refused to take an oath. Judgment was ultimately entered for the plaintiff instead.[19]

For our purposes, however, the most important characteristic of Milan's use of the oath was that it was an essentially adjudicator-controlled means of proof. In doubtful cases,

[17] Id., no. 71, at 101 ("Et ideo ipsa Biriana super his suos produxit testes qui ad plenam probationem non fuerunt visi sufficientes, set ad presumptionem satis fuerunt visi habiles.").
[18] Id. at 102 ("Qui testes statim iuraverunt ut testificati erant, et ipsa Biriana iuravit ut supra […].").
[19] See id., no. 29, at 46–47.

the Milanese communal judges had to make the determination that one of the two parties was overall more credible. They then had to determine the proper scope of the oath, which could encompass either the entire claim of a party or a specific factual issue or issues; an example of the latter is the December 1188 case discussed above in which the communal judge hearing the dispute appears to have directed the defendant to swear an oath as to a specific factual issue as to the circumstances of a purported cow theft.[20] Whatever variant was used, the exploitation of one or both of the parties as a source of proof, in this approach, lay largely in the hands of the adjudicating panel.

2.2 Other Northern Italian Communes

No Italian commune, to my knowledge, ever used the party oath in its judicial proceedings as frequently as Milan. If we turn our attention to the judicial and arbitral proceedings of other northern Italian communes and their surrounding territories, we find a use of party oaths that is arguably more consistent with the expectation of infrequency that one draws from Bulgarus's letter. Nonetheless, we also find that, despite much local variation, the approach to the use of parties as sources of proof remains, as in Milan, essentially adjudicator-controlled.

Parma, to the southeast of Milan, can serve as one illustration. In contrast to the records of Milan, most surviving decisions from in and around Parma[21] make no mention of what proofs, if any, were presented at trial, even in cases in which both parties were apparently present for the proceeding and neither was held contumacious. This is true for

[20] See supra text accompanying notes 9–12.
[21] On the administration of justice in the area of Parma in the twelfth and early thirteenth centuries, see Olivier Guyotjeannin, "Conflits de juridiction et exercice de la justice à Parme et dans son territoire d'après une enquête de 1218," *Mélanges de l'École française de Rome: Moyen-Âge, Temps modernes* 97 (1985): 256–82.

most decisions issued by adjudicators purporting to act under the authority of the commune of Parma.[22] It is also true for most decisions issued by adjudicators claiming other bases of authority: the bishop of Parma and other clerics acting under a purported delegation from the Holy Roman emperor,[23] pursuant to a grant of legatine jurisdiction,[24] or on unstated authority[25]; the "consuls" of an outlying settlement[26]; "imperial judges" (*iudices imperiales*)[27]; and other local "cognizors" (*cognitores*) and arbitrators, some at least notionally "chosen" (*electi*) by the parties, others acting on unclear authority.[28] When proofs are mentioned, they are in all but a few cases the familiar witness testimony and documentary

[22] Giovanni Drei, ed., *Le carte degli archivi parmensi del sec. XII*, vol. 3 (Parma: Archivio di Stato di Parma, 1950) [hereinafter Drei], no. 465, at 370 (1176 ott. 16); id., app. no. 21, at 694–95 (1179 lug. 15); id., no. 500, at 394 (1179 lug. 23; defendant contumacious); id., app. no. 39, at 708–9 (1181 nov. 6; defendants contumacious); id., app. no. 40, at 328–29 (1181 dic. 16); id., app. no. 78, at 736–37 (1188 lug. 2); id., no. 707, at 526 (1191 dic. 20); id., app. no. 121, at 763 (1193 mar. 20); id., app. no. 154, at 783 (1196 apr. 15; defendant held contumacious, but no definitive sentence issued); id., app. no. 163, at 786 (1196 ott. 15); id., app. no. 152, at 781–82 (1196 dic. 30); id., no. 824, at 596–97 (1197 dic. 3); id., no. 876, at 631–32 (1199 mar. 6); id., no. 877, at 632 (1199 mar. 6); id., no. 878, at 632–33 (1199 mar. 6); id., no. 880, at 634 (1199 mar. 7); id., no. 887, at 638–39 (1199 mar. 30); id., no. 891, at 641 (1199 apr. 6); id., no. 892, at 641–42 (1199 apr. 6); id., no. 893, at 642 (1199 apr. 6); id., no. 894, at 642–43 (1199 apr. 7; defendant contumacious); id., no. 896, at 644 (1199 apr. 13); id., no. 897, at 644–45 (1199 apr. 13); id., no. 926, at 659 (1199 dic. –); id., no. 951, at 673–74 (1200 nov. 12; defendants contumacious); id., no. 953, at 675 (1200 nov. 19); id., no. 955, at 676 (1200 nov. 21). There is one case in which the defendant obviated the need for proof by confessing (i.e., admitting) the full claim of the plaintiff. See id., no. 954, at 675–76 (1200 nov. 20).

[23] Id., no. 279, at 228 (1162 apr. 25); id., no. 289, at 235 (1163 mar. 7; default judgment for failure to post security).

[24] Id., app. no. 103, at 754 (1192 giu. 9).

[25] Id., no. 460, at 367 (1178 dic. 3); id., no. 822, at 593–95 (1197 ott. 5).

[26] Id., no. 563, at 435–36 (1183 ott. 19).

[27] Id., no. 315 (1164 mar. 19).

[28] Id., no. 284, at 231–32 (1162 set. 6); id., no. 405, at 328–29 (1171 ott. 21); id., app. no. 12, at 689 (1178 set. 10); id., app. no. 13, at 689–91 (1178 ott. 15); id., no. 610, at 468–69 (1186 ago. 23); id., no. 664, at 502–4 (1189 ott. 6); id., app. no. 136, at 771–72 (1194 ago. 22).

evidence preferred by Roman-canon procedure,[29] although use of a jury or visual inspection of sites by the judge was apparently possible in one special type of land proceeding.[30]

In those few cases from Parma in which there are signs that a party was used as a source of proof, however, the proof in question seems to have been either volunteered by a confessing party or, as in Milan, induced by the court or arbitral panel. Thus in one case from 1179, the defendants appear to have voluntarily admitted ("confessed") some, but not all of the allegations of the plaintiffs.[31] In two cases from 1194 and 1196, oaths were used: parties were made to swear to the truth of specified factual allegations. These oaths were then apparently used as bases for judgment by the court.[32] Most intriguing, and unparalleled, is a single case from 1163[33] in which both parties were questioned about their dispute as if they were witnesses in the proceeding. The questions and their responses were taken down in a form often used for witness depositions[34] and transcribed, like witness depositions, on a

[29] Id., no. 268, at 220 (1160 feb. 23; witnesses and documents); id., no. 316, at 259 (1164 apr. 30; witnesses); id., no. 387, at 315–16 (1170 apr. 13; witnesses); id., no. 487, at 386 (1177 dic. 30; witnesses); id., no. 502, at 395–96 (1179 ott. 26; witnesses); id., no. 510, at 402–3 (1180 lug. 13; witnesses and documentary evidence); id., app. no. 37, at 707–8 (1181 mag. 11; witnesses); id., app. no. 42, at 710–11 (1181 dic. 31; witnesses); id., no. 546, at 425–26 (1182 dic. 4; witnesses and documentary evidence); id., app. no. 103, at 754 (1192 giu. 9; witnesses). In one further case reference is made to witness testimony given in an earlier proceeding. See id., app. no. 23, at 696–97 (1179 nov. 16).

[30] Id., no. 887, at 638–39 (1199 mar. 30); id., no. 889, at 639–40 (1199 apr. 6). This is the proceeding of *ingrossatio* ("engrossment"), whereby a claimant could request that the commune expropriate one or more parcels of land belonging to the respondent and transfer the land to the claimant; in return, the claimant would transfer equivalent parcels situated elsewhere to the respondent. On this practice in Parma, see Alessandro Lattes, "Le ingrossazioni nei documenti parmensi," *Archivio storico per le province parmensi*, n.s., 13 (1913): 207–33.

[31] Drei app. no. 23, at 696–97 (1179 nov. 16).

[32] Id., app. no. 139, at 774 (1194 dic. 6); id., no. 797, at 576–78 (1196 dic. 30).

[33] Id., no. 309, at 250–51 (1163 dic. 19); id., no. 310, at 251–52 (1163 dic. 21).

[34] The questions and responses are phrased in the form *interrogatus si sciret* or *interrogatus si sciret vel crederet … respondit quia scit* or similar. Cf., e.g., id., no. 571, at 441–45 (an example of witness depositions, taken at Parma in 1183).

document separate from the definitive sentence itself, which was dated two days later.[35] Here there is no indication that the parties were examined under oath. But as in the 1194 and 1196 cases just mentioned, what is significant for our purposes is that the court, not the parties, seems to have remained the source of the questioning. In this 1163 case specifically, the record implies, although it does not make absolutely clear, that the questions came from the judges in the proceeding, not the parties. The implication can be drawn from a point in the record where the notary specifies, anomalously, that one party directly questioned the other ("Arpo himself questioned the provost whether he believed […]"), suggesting that the other questions came from the court.[36]

A similar conclusion can be drawn about the nearby commune of Piacenza, also to the southeast of Milan. As in Parma, witness testimony and documentary evidence appear in abundance in judicial and arbitral decisions that survive from in and around twelfth-century Piacenza, at least in those decisions that mention proofs at all.[37] As in Parma, too, there are

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[35] The notary drafting the document understood that he was not taking down ordinary witness depositions, however. He refers to the document as "this charter of confession" (*hanc cartulam confessionis*); the statements in the document are understood to be the parties' "confessions." See id., no. 309, at 251 ("Ego Albertus not. iussus a predicto Guiberto de Burnado et a predicto Henrico Pinguilino hanc cart. confessionis scripsi.").

[36] Id. ("ipse Arpus interrogavit prepositum si crederet").

[37] See, e.g., id., no. 212, at 178 (1152 ago. 11; witnesses, documents); Giovanna Zagni, "Le carte dell'Archivio degli Ospizi civili di Piacenza dal 1151 al 1175," adv. Ettore Falconi (tesi di laurea, Università degli studi di Parma, 1973–74) [hereinafter Zagni], no. 10, at 47–53 (1155 ott. 6); Drei no. 274, at 224–25 (1161 dic. 20; documents); Drei no. 412, at 333–34 (1172 apr. 28; witnesses); Luisa Catozzi, "Le carte dell'Archivio degli Ospizi civili di Piacenza dal 1175 al 1184," adv. Ettore Falconi (tesi di laurea, Università degli studi di Parma, 1974–75) [hereinafter Catozzi], no. 5, at 12–16 (1175 set. 14; witnesses, documents); id., no. 12, at 34–38 (1176 ago. 28; documents (probably; record damaged)); id., no. 13, at 39–40 (1176 dic. 30; witnesses); id., no. 26, at 88–89 (1179 gen. 12; witnesses, documents); Drei no. 526, at 413–14 (1181 nov. 15; witnesses, documents); id., no. 559, at 433 (1183 apr. 1; witnesses); id., no. 631, at 482–83 (1187 nov. 6; witnesses, documents); id., no. 640, at 488–90 (1188 apr. 8; documentary proof). For decisions without mention of specific proofs, see, for example, Stefano Arata, "Trascrizione pergamene dell'Archivio degli Ospizi civili di Piacenza (1019–1150)," adv. Ettore Falconi (tesi di laurea, Università degli studi di Parma,

also signs of the use of parties as sources of proof, but this proof seems always either to have been volunteered by a confessing party[38] or induced by the court. Thus in two cases, a party seems to have sworn an oath comparable to some of the oaths used in Milan. In a case from 1180, for example, the litigants had formed a consortium to operate certain watermills together (*societas molendinorum*). The defendant was required by the consortium agreement to channel water to the mills "entirely at his own expense" (*ad omnes suas expensas*) but had failed to do so. The defendant said that he had worked in good faith to set up the water channel but had been prevented by "many impediments" (*multa impedimenta*). After hearing witness testimony, the court directed the defendant to swear that he had indeed made good-faith efforts to channel the water and had done nothing to cause damage to the plaintiffs before issuing judgment in his favor.[39] Here again, as in Parma and in Milan, in cases in which parties are used for evidentiary purposes, it is the court, not the opposing party, that controls the deployment of the means of proof.

The pattern is largely the same to the west, in case records from the communes of Genoa and Savona and their environs up through the end of the 1100s. As in Parma and Piacenza, in Genoa and its surrounding territory, proof is often not mentioned at all in decisions. Some such decisions come from proceedings before the consuls of Genoa, the

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1971–72), no. 39, at 136–41 (1144 gen. 30); Drei no. 163, at 138–40 (1145 giu. 27); Zagni no. 1, at 1–2 (1151 feb. 6); id., no. 25, at 144–46 (1168 gen. 5); Drei no. 373, at 300–301 (1169 lug. 10); Catozzi no. 17, at 51–54 (1178 feb. 15); Drei no. 538, at 421–22 (1182 mag. 23); Catozzi no. 47, at 168–71 (1183 nov. 23); Drei no. 657, at 498–99 (1189 mag. 9); id., no. 769, at 561 (1195 dic. 18); id., no. 792, at 573–74 (1196 ago. 16); id., no. 796, at 576 (1196 dic. 7); id., no. 801, at 580 (1197 feb. 8); id., no. 919, at 655 (1199 ott. 23; defendants contumacious).

[38] See Drei no. 265, at 218 (1159 giu. 5); id., no. 508, at 399–400 (1180 mag. 5).

[39] Id., no. 513, at 404–5 (1180 set. 13). The other case that seems to be of this type is Catozzi no. 46, at 163–68 (1183 ott. 13).

officers of the commune[40]; others from proceedings before local clerics acting as adjudicators either under delegation from the papacy in Rome or under delegation from the archbishop of Genoa[41]; others from proceedings before "consuls" of outlying small localities near Genoa[42]; and still others from proceedings before arbitrators who had been at least notionally chosen

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[40] Cesare Imperiale di Sant'Angelo, ed., *Codice diplomatico della repubblica di Genova*, vol. 1 (Rome: Tipografia del Senato, 1936) [hereinafter Imperiale di Sant'Angelo], no. 42, at 1:54–55 (1127 ago.); Gabriella Airaldi, *Le carte di Santa Maria delle Vigne di Genova (1103–1392)* (Genoa: Fratelli Bozzi, 1969) [hereinafter Airaldi], no. 6, at 7–8 (1130 ago.); Cristina Soave, ed., *Le carte del monastero di Sant'Andrea della Porta di Genova (1109–1370)* (Genoa: Regione Liguria, Assessorato alla Cultura, 2002), no. 2, at 4–5 (1131 dic.); Imperiale di Sant'Angelo vol. 1, no. 213, at 264–65 (1150 ott.); Airaldi no. 12, at 14–15 (1151 gen. 18); Mario Chiaudano and Mattia Moresco, eds., *Il cartolare di Giovanni Scriba* (Rome: R. istituto storico per il medio evo, 1935) [hereinafter *Giovanni Scriba*], no. 2, at 1:1–2 (1154 dic.); id., no. 38, at 1:19–20 (1156 feb. 15); id., no. 43, at 1:21–22 (1156 feb. 20); id., no. 57, at 1:31 (1156 apr. 7; stating that the plaintiff had failed to adduce sufficient proof); id., no. 75 at 1:40 (1156 mag. 9; stating that the defendant's flight obviated the need for proof); Airaldi no. 40, at 43–44 (1181 dic. 10). In one further case, the plaintiff appears to have withdrawn his claim. See *Giovanni Scriba*, no. 45, at 1:22–23 (1156 feb. 22).

[41] Mario Chiaudano, ed., *Oberto Scriba de Mercato (1186)* (Genoa: R. deputazione di storia patria per la Liguria, 1940) [hereinafter *Oberto (1186)*], no. 304, at 114–15 (1186 dic. 2); Margaret W. Hall, Hilmar C. Krueger, and Robert L. Reynolds, eds., *Guglielmo Cassinese (1190–1192*) (Genoa: R. deputazione di storia patria per la Liguria, 1938) [hereinafter *Cassinese*], no. 238, at 1:96–97 (1191 feb. 22; defendants contumacious); id., no. 702, at 1:278 (1191 giu. 11; defendant contumacious); id., no. 1364, at 2:99–100 (1191 dic. 2; defendant contumacious).

[42] Mario Chiaudano and Raimondo Morozzo della Rocca, eds., *Oberto Scriba de Mercato (1190)* (Genoa: R. deputazione di storia patria per la Liguria, 1938) [hereinafter *Oberto (1190)*], no. 60, at 26 (1190 gen. 29); id., no. 61, at 26 (1190 gen. 29); id., no. 62, at 26 (1190 gen. 29); no. 63, at 26–27 (1190 gen. 29; indicating what was proved but not the means of proof: "Hoc autem ideo quia probavit quod eos sibi promixit et cunvenit dare in dotem Anne predicte plus quam alicui aliarum suarum filarum daret" (27)); id., no. 64, at 27 (1190 gen. 29); id., no. 65, at 27–28 (1190 gen. 29; indicating what was proved but not the means of proof: "Hoc autem ideo, quoniam cum incepiset probare quod minor erat cum Tarantus emit eam, defecit in probacione et Tarantus probavit quod iuste emerat eam et iusto titulo" (27)); id., no. 87, at 35 (1190 feb. 1); *Cassinese*, no. 1500, at 2:153 (1192 gen. 20; reporting a finding of fact but not indicating the means of proof: "Quod ideo fecerunt [i.e., rendered judgment] quoniam predictus Wilielmus prefatam Aidealm male percussit et male pertractavit"); J. E. Eierman, H. G. Krueger, and R. L. Reynolds, eds., *Bonvillano (1198)* (Genoa: R. deputazione di storia patria per la Liguria, 1939) [hereinafter *Bonvillano*], no. 171, at 87 (1198 nov. 6); id., no. 211, at 112 (1198 dic. 4); id., no. 219, at 119–20 (1198 dic. 13).

by the parties.[43] There are, of course, numerous decisions of all of these types that also specify the means of proof employed. When proof is specified at all, here too, witness and documentary proofs predominate in decisions of the consuls of Genoa,[44] of local ecclesiastics,[45] of the consuls of outlying localities,[46] and of party-chosen arbitrators.[47]

In those few cases in which a party *does* appear clearly as a source of proof, however, the evidence points generally to an adjudicator-controlled approach comparable to the approaches taken by Milan, Parma, and Piacenza. In two cases, one or both parties are referred to in the record as having "confessed" to particular facts, but whether these "confessions" were spontaneous or prompted by questioning is unclear.[48] In a third case, an 1192 proceeding before the consuls of the locality of Nervi, the notarial record suggests that

[43] *Oberto (1186)*, no. 286, at 108 (1186 nov. 27); *Oberto (1190)*, no. 311, at 123–24 (1190 mar. 31); id., no. 319, at 126–27 (1190 apr. 1); *Cassinese*, no. 17, at 1:10 (1190 dic.; fragmentary); id., no. 81, at 34 (1191 gen. 17); id., no. 278, at 113–14 (1191 mar. 10); id., no. 505 at 201 (1191 apr. 24); Imperiale di Sant'Angelo vol. 3 (Rome: Tipografia del Senato, 1942), no. 13, at 30–34 (1192 feb. 20); *Bonvillano*, no. 10, at 4–5 (1198 set. 6); id., no. 11, at 5–6 (1198 set. 6); id., no. 12, at 6 (1198 set. 6); id., no. 13, at 7 (1198 set. 6); id., no. 162, at 80–81 (1198 nov. 2).

[44] Imperiale di Sant'Angelo vol. 1, no. 77, at 95–97 (1137 gen.; witnesses); id., vol. 1, no. 114, at 137 (1141; witnesses?); *Giovanni Scriba*, no. 42, at 1:21 (1156 feb. 16; documentary proof); id., no. 80, at 1:42–43 (1156 mag. 18; witnesses); Luigi Tommaso Belgrano, ed., *Il registro della Curia arcivescovile di Genova*, Atti della Società ligure di storia patria vol 2., pt. 2 (Genoa, 1862): 127 (1159 nov. 12; witnesses).

[45] Belgrano, *Il registro*, 380–81 (1164 dic.; witnesses); *Oberto (1190)*, no. 189 (1190 feb. 27; witnesses); *Cassinese*, no. 1507, at 2:155 (1192 gen. 22; witnesses).

[46] *Oberto (1186)*, no. 274, at 102–3 (1186 nov. 18); *Oberto (1190)*, no. 454, at 179–80 (1190 mag. 1; witnesses); *Cassinese*, no. 1553, at 2:176 (1192 gen. 31; documentary proof); id., no. 1641, at 2:212–13 (1192 feb. 29; witnesses); id., no. 1754, at 2:254 (1192 mar. 17; witnesses).

[47] *Cassinese*, no. 834, at 1:334 (1191 lug. 14; documentary proof); *Bonvillano*, no. 113, at 51–53 (1198 ott. 8(?); witnesses?); id., no. 166, at 84 (1198 nov. 6; witnesses, documentary proof).

[48] Belgrano, *Il registro*, 340 (1150 set. 2; "[h]anc laudem ideo fecerunt quia cognouerunt testibus et confessione Rainaldi terram illam antiquitus fuisse libellariam, et cunctam pensionem pro eadem terra ecclesie sancti Syri fuisse prestitam"); Airaldi no. 42, at 45–46 (1184 mar. 13; "[h]oc autem ideo factum est quoniam […] ille Enricus per se et fratres suos et omnes eorum heredes, quoniam tenetur de toto, ut confitetur, et predictus prepositus per se et successores suos. Possessionem et dominium uterque alteri tradidisse confitetur" (46)).

the son of the defendant may have "confessed" in response to questioning by the consuls, who are reported as having "inquir[ed] into the sequence of what happened" (*inquirentes rei seriem*).[49] In several other cases, the adjudicators appear to have used the party oath in a manner resembling that of the courts of Milan.[50] The notarial record of one of these cases, an October 1154 proceeding before the consuls of Genoa, suggests that the consuls directed the representative of the (minor) defendants to provide factual information under oath about a prior transaction involving the land in dispute.[51] In another of the cases, an August 1190 proceeding before a party-elected sole arbitrator, the notarial record implies that the arbitrator relied on the testimony of the plaintiff's witnesses but confirmed that testimony by the plaintiff's oath.[52] In one further case, a January 1192 matrimonial cause before a papal judge delegate, the judge first received witness testimony, then had the purported wife, who was seeking a decree of annulment, swear an oath resolving a remaining doubt. The "tenor" of the oath, the record reports, was that the woman had never consented to marriage: "that in the [offer of] bethrothal that Bartolomeo [i.e., the purported husband] made to her, she consented neither then nor later."[53]

What I have said about Genoa holds true also of the case records of Savona, a commune to the west and south of Genoa along the Mediterranean coastline whose economy

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[49] *Cassinese*, no. 1509, at 2:157 (1192 gen. 23).
[50] In addition to the cases discussed below, see also *Giovanni Scriba*, no. 46, at 1:25 (1156 feb. 25); id., no. 52, at 1:28–29 (1156 mar. 27); id., no. 1217, at 2:207 (1164 giu. 18).
[51] See Soave, ed., *Carte*, no. 4, at 7 (1154 ott.) ("Hoc ideo fecerunt [i.e., the consuls of Genoa issued judgment] quia cognoverunt, confessione tutoris minorum et patrui, immo sacramento eius, eumdem Rubaldum vendidisse monasterio hanc terram et promisisse facere cartam per libras tres denariorum ianuinorum, set morte preventus cartam facere non potuit […].").
[52] See *Oberto (1190)*, no. 616, at 243–44 (1190 ago. 11; "[p]robavit itaque Comitisa idoneis testibus et suo iuramento").
[53] See *Cassinese*, no. 1467, at 138–40 (1192 gen. 5; "et sacramento Elene recepto cuius tenor talis fuit: quod in desponsatione quam fecit ei Barthomeus, tunc non consensit nec postea" (140)).

was closely linked to that of Genoa.[54] A single notarial cartulary drawn up by two notaries survives from the 1100s in which case records can be found. In one case from January 1179, the consuls of Savona are reported as having reached their decision "through the confession of" the defendant to the existence of a debt.[55] In another case, from December 1180, the notarial record reports that the plaintiff claimed from the defendants a debt of ten pounds "minus thirty-two shillings, which he confessed that he had received out of the aforesaid ten pounds."[56] It is impossible to reconstruct the procedural circumstances in which these party statements were made. But what seems clear is that Savona, like Genoa and the other communes we have surveyed elsewhere in northern Italy, took an essentially adjudicator-controlled approach to the exploitation of parties as sources of proof.

3. THE PARTY AS A SOURCE OF PROOF: THE OPPONENT-CONTROLLED APPROACH

3.1 Pisa

I have been discussing what I have been calling the adjudicator-controlled approach to the use of parties as sources of proof in twelfth-century practice. There is, however, an alternative approach in our sources to the exploitation of parties as sources of proof. The approach is as best as I can determine—and here I stress that further research in the primary sources is needed for confirmation—first attested in Pisa. In this alternative approach, not the

[54] On the strong influence of Genoa on Savona in this period, see Italo Scovazzi and Filippo Noberasco, *Storia di Savona* (Savona: Tipografia italiana, 1926), 1:169.
[55] See Laura Balletto, Giorgio Cencetti, Gianfranco Orlandelli, and Bianca Maria Pisoni Agnoli, eds., *Il cartulario di Arnaldo Cumano e Giovanni di Donato (Savona, 1178–1188)* (Rome: Ministero per i beni culturali e ambientali, 1978), no. 75, at 2:141 ("Nos consules […] cognovimus, per confessionem Amedei de Corso, quod idem Amedeus debebat dare gabelle salis sol. l […].").
[56] Id., no. 640, at 2:346–47 ("minus sol. xxxii, quos confitebatur se recepisse de predictis lb. x" (347)).

adjudicator, but the *opposing party* decides both whether to attempt to use the other party as a source of proof and what information will be sought from the other party. This opponent-controlled approach has no precedent in Bulgarus or other mid- to late twelfth-century writers on Roman-canon procedure, or in classical or postclassical Roman procedure. The courts and arbitral panels of the commune of Pisa in Tuscany show the emergence of this alternative in their case records from the second half of the twelfth century.

Like the communal courts of Milan, communal courts and arbitral panels in and around Pisa followed a form of procedure that generally resembled the outline given by Bulgarus in *Karissimo domino et amico A*.[57] Also as in Milan, proof by witness testimony and documentary evidence predominates in the written record. Pisan cases are distinctive, however, in their more explicit use of argument derived from Roman law. From 1159 onward, a Pisan plaintiff was expected to state the specific form of action in the Roman law of the *Corpus iuris* or in local statute that provided a basis for relief, a requirement that twelfth-century lawyers teaching in Bologna cited with approval. Compared to their Milanese counterparts, Pisan case records are also distinctive in their relatively more extensive and detailed discussion of the parties' pleadings and their proofs and arguments at trial.[58]

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[57] Pisan procedure is set forth in detail in Amerigo D'Amia, *Diritto e sentenze di Pisa: Ai primordi del rinascimento giuridico*, 2nd ed. (Milan: Giuffrè, 1962) [hereinafter D'Amia], 107–80.

[58] See id. at 113–23 (discussing the Roman forms of action used in Pisa); Chris Wickham, *Courts and Conflict in Twelfth Century Tuscany* (Oxford: Oxford Univ. Press, 2003), 114–34 (discussing the use of argument from Roman law in twelfth-century Pisa). On the unusually advanced state of Romanist jurisprudence in twelfth-century Pisa, see infra text accompanying notes 121–24.

One illustration of this discursive, consciously Romanist style of proceeding in Pisa is the sentence of a panel of two communal judges from December 1159,[59] the first case in which the plaintiff is recorded bringing a specific Roman form of action.[60] The record begins with a brief protocol[61] giving a standard invocation ("In the name of the eternal God amen."). A lengthy narration then follows. The narration begins with an intitulation naming the judges and parties in the proceeding before stating the parties' petition and response. In this case, the plaintiff Ildebrando, a representative (*sindicus*) of the canons of the cathedral chapter of Pisa, brought two forms of action against defendant Quattromani ("Four Hands"). One, a *condictio ex lege "De rebus et libertatibus iniuste ablatis vel invasis"* ("restitutionary action on the basis of the statute *On property and liberties unjustly taken away or entered upon*") was an action provided for in Pisan communal statute. It required a defendant who had "unjustly" interfered with a property right of the plaintiff to make restitution.[62] The other, an action on the interdict *uti possidetis*, was drawn from the *Corpus iuris*. The action on the interdict lay under certain circumstances to prevent a defendant from disturbing the plaintiff's existing possession of real property. Ildebrando brought the first, restitutionary action to compel the defendant to restore part of a field of reclaimed marshland that the defendant had planted

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[59] The Pisan calendar began the year on the March 25 before the beginning of the Julian year. Natale Caturegli, "Note di cronologia pisana," *Bollettino storico pisano* 1 (1932): 21; Hermann Grotefend, *Zeitrechnung des deutschen Mittelalters und der Neuzeit*, vol. 1, *Glossar und Tafeln* (Hanover, 1891), 9. Julian dates are given in the text.

[60] Rosalia Sgherri, "I documenti dell'Archivio capitolare di Pisa dall'agosto 1155 al 18 febbraio 1176," adv. Ottorino Bertolini (tesi di laurea, Università degli studi di Pisa, 1963–64) [hereinafter Sgherri], no. 30, at 144–48. On this case see also the discussion in Wickham, *Courts and Conflict*, 124–25.

[61] On the diplomatics of the Pisan documentation, see the detailed account in D'Amia 191–204. I use the diplomatic terminology of Harry Bresslau, *Handbuch der Urkundenlehre für Deutschland und Italien*, 2nd ed. (Leipzig: Veit, 1912), 1:46–48.

[62] See Paola Vignoli, *I Costituti della legge e dell'uso di Pisa (sec. XII): Edizione critica integrale del testo tràdito dal "codice Yale" (ms. Beinecke Library 415)* (Rome: Istituto storico italiano per il medio evo, 2003), 115 (*Constitutum legis*, rub. *de possessionibus iniuste ablatis et invasis*).

with seed and marked out with stones. He brought the second action, on the interdict, to prevent the defendant Quattromani from interfering with the cathedral chapter's possession of any other part of the tract of land.[63] A description of the land in question immediately follows in the record.[64] Quattromani thereupon responded with a denial. A *condictio ex lege* did not lie, he said, "because he [had] not unjustly taken away or entered upon" the land, as the Pisan statute required; an action on the interdict did not lie because the canons of the cathedral chapter were not in actual possession of the land in question, as Roman law required.[65]

With this initial pleading phase completed, the record goes on to report the parties' proofs. Ildebrando first produced witnesses who testified under oath that the cathedral canons were indeed in actual possession of the land in question, pointing out that the canons had plowed the field with oxen, planted trees, and dug a ditch.[66] The cathedral canons' argument was apparently aimed at showing that the land in question had been newly reclaimed, and that the canons were therefore the first people to take possession of the field. Quattromani countered with evidence that he, not the canons, was the party who had had earlier possession. He argued that "even if it had been true that" the canons held actual possession of

[63] See Sgherri no. 30, at 144 ("Chr. In eterni Dei nomine amen. Nos Guido et Ildebrandus, publici Pisanorum iudices ad causas publicas seu privatas diffiniendas a consulibus electi, litem, que vertebatur intra Ildebrandum sindicum canonicorum, pro ipsis, et Quattuormanum, sic diffinimus, siquidem prefatus sindicus egit adversus eum condictione ex lege illa de rebus et libertatibus injuste ablatis vel invasis, de parte cuiusdam lentie, que est plagia posita in Orticaria prope ecclesiam sancti Hermetis, quam partem Quattuormanum seminasse et ibi lapides posuisse dicebat, de reliqua vero parte egit interdicto uti possidetis.").
[64] Id. at 144–45 ("Que tota videlicet lentia, que est plagia, tenet caput in Arno, aliud caput coheret terre veteri ecclesie et canonice sancte Marie, cui hanc plagiam sindicus adiuctam esse dicit, latus unum adheret terre Karissime et filii eius, aliud latus terre filiorum Gualfreducii.").
[65] Id. at 145 ("Quattuormanus vero respondit de rebus et libertatibus locum non habere, quia non abstulit iniuste neque invasit, et interdicto uti possidetis non habere locum, quia a canonicibus non possidetur.").
[66] Id. ("At sindicus canonicos possedisse et nunc possidere dicebat et ad hoc probandum testes produxit, qui sub suo sacramento testati sunt hanc plagiam canonicos possedisse et bubus arasse et arbores in ea plantasse et foveam fecisse.").

the land and had done the things their witnesses said they had, the evidence of his own possession was "older and better." He presented counterproof in the form of witnesses who testified under oath that he had entered into possession of the field ten years before and on entering onto the property had destroyed a hedge that had been planted at one end of the tract, suggesting that the land could not have been newly reclaimed.[67] Ildebrando responded to this counterproof by arguing that whether the defendant had destroyed a hedge on entering the property was of no consequence. The cathedral chapter, he said, had ordered the setting up of the hedge in the first place, proving that the chapter canons had been in actual possession of the field before the defendant had ever come onto the land.[68] This response led to further, lengthy discussion between the parties, with further witness testimony, about where exactly the hedge had been: whether it had been planted on newly reclaimed marsh, as the canons argued, or on "older" land, as Quattromani insisted.[69]

After hearing these alternating party arguments and proofs, the judicial panel deciding the case undertook to test whether the land was newly reclaimed or not by making a site

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[67] Id. ("Quattuormanus vero, etsi ver[um fuisset] canonicis hanc terram esse possessam et aratam et arbores in ea pro eis fore plantatos et foveam ibi factam, tamen nichil sibi obesse dicebat, cum ipse antiquior et potior in possessione predicte plagie fuerit, unde testes attulit, qui sub suo iuramento testati sunt Quattuormanum in possessionem iste plagie ingressum fuisse decem annis iam transactis et sepem in capite predicte plagie factam destruxisse.").
[68] Id. ("At sindicus canonicorum, etsi testes Quattuormani dicant quod iam sint decem [annis] quod Quattuormanus in possessionem prescripte plagie ingressus fuerit, tamen potius pro canonicis quam pro Quattuormanu dixiss[e] … cum testes ipsi dicant sepem ubi est modo capanna factam Quattuormanum destruxisse, quam ab hominibus canonicorum fore factam, allegabat.").
[69] See id. at 145–46 ("Quattuormanus autem, quod testes sui testantur sepem eum destruxisse, nichil sibi obesse, immo prodesse, allegabat, cum sepis illa in terra veteri et non nova esset facta, ut ipsi testes dixerunt, cum Quattuormanus ad hanc plagiam veniret et minaretur rusticis ut sepem auferrent et ipsi dicebant: 'Nos non sumus in terra nova immo in terra veteri.' Sindicus vero sepem quam Quattuormanus destruebat et sanicastros qui ante eam erant et tertiam partem capanne [in terra nova] non veteri fuisse allegabat, et hoc testibus probavit […].").

inspection.[70] Finding that the land was newly reclaimed, the panel then stated its disposition of the case: it found Ildebrando's arguments more persuasive, and thus entered judgment in favor of the cathedral canons.[71] The record closes with an eschatocol giving the date of decision and the subscriptions of the judges and drafting notary.[72]

I have recounted the December 1159 dispute between the cathedral canons and Quattromani in some detail to convey the formal structure of Pisan case records from mid- to late century. Other case records of the Pisan communal courts, from the time that Pisan courts begin to require explicit use of Roman-law forms of action in late 1159 and continuing through the 1160s and 1170s, are similar in most formal respects to the December 1159 case. Most important, in the law of proof in particular, the repertory of proofs is largely as Bulgarus's letter would have us expect.

As expected, witness testimony and documentary evidence predominate in the Pisan cases throughout the twelfth century. Adjudicators acting in the name of the commune of Pisa are recorded as deciding, by my estimate, seventy surviving cases from in or around Pisa between 1138, the year in which the earliest case naming communal officials as the adjudicators was decided, and the end of the twelfth century. In a number of these cases, one of the parties was held to be in "contumacy" (*contumacia*), in the language of Roman-canon procedure, for failure to participate in the proceeding, or in one case was "deemed to have confessed" (*pro confesso*) for failure to swear the required calumny oath after joinder of

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[70] Id. at 146 ("[… E]t ad maiorem evidentiam nos in tertia parte capanne fodi plus quam novem pedes iustos fodi fecimus et semper terram novam et non veterem invenimus.").
[71] Id. ("Unde nos iudices, causa cognita, rationibus isti sindici fidem accomodantes, Quattuormanum in restitutionem possessionis plagie illius partis iste plagie, quam ipse seminavit et in qua lapides posuit, prescripto sindico, et de reliqua parte plagie ut eum pro ecclesia sancte Marie de cetero quiete possidere s… [da]mnamus.").
[72] See id. at 146–47.

issue. In those cases, a default judgment was entered against the contumacious party without the proof phase of the trial ever taking place.[73] In a few cases, neither party was in default, but the decision does not indicate what proofs, if any, were presented.[74] In several other instances, all cases in which land boundaries were in dispute, the adjudicating officials are

[73] Twenty-five contumacy cases by my count: Silio P. P. Scalfati, ed., *Carte dell'Archivio arcivescovile di Pisa: Fondo arcivescovile*, vol. 2, *(1101–1150)* (Pisa: Pacini, 2006) [hereinafter Scalfati 2], no. 124, at 231–32 (1138 nov. 6); Silio P. P. Scalfati, ed., *Carte dell'Archivio arcivescovile di Pisa: Fondo arcivescovile*, vol. 3, *(1151–1200)* (Pisa: Pacini, 2006) [hereinafter Scalfati 3], no. 19, at 31–32 (1156 dic. 31); Maria Luigia Orlandi, ed., *Carte dell'Archivio della certosa di Calci (1151–1200)* (Pisa: Pacini, 2002) [hereinafter Orlandi], no. 13, at 26–27 (1157 nov. 28); id., no. 15, at 29–31 (1158 set. 29); Scalfati 3 no. 30, at 49–51 (1159 dic. 22); Lina Cortesini, "Le pergamene dell'Archivio di Stato di Pisa dal 1165 al 1172," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1964–65) [hereinafter Cortesini], no. 12, at 51–54 (1166 set. 9); id., no. 14, at 62–64 (1166 nov. 29); Sgherri no. 72, at 272–81 (1169 nov. 18); id., no. 75, at 288–89 (1170 mar. 15); Cortesini no. 45, at 189–91 (1170 set. 2); Luciana Benedetti, "Le pergamene dell'Archivio di Stato di Pisa dal 1175 al 1179," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1965–66) [hereinafter Benedetti], no. 37, at 155–56 (1177 dic. 17); id., no. 38, at 157–58 (1177 dic. 17); id., no. 43, at 174–76 (1178 giu. 6); Orlandi no. 101, at 194–95 (1180 ago. 23); Scalfati 3 no. 87, at 161–63 (1181 mar. 5); id., no. 88, at 163–64 (1181 mar. 5); Orlandi no. 107, at 205–207 (1181 dic. 2); Scalfati 3 no. 107, at 211–12 (1182 dic. 22); D'Amia 263 = Bruno Pellegrini, "Le pergamene dell'Archivio di Stato di Pisa dal 1179 al 1184," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1965–66) [hereinafter Pellegrini], no. 58, at 276–78 (1183 ott. 20); Scalfati 3 no. 102, at 201 (1183 lug. 11); id., no. 103, at 202–203 (1183 lug. 11); id., no. 115, at 245–46 (1186 giu. 12); D'Amia 272–73 = Maria Daniela Casalini, "Le pergamene dell'Archivio di Stato di Pisa dal 1188 al 1192," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1966–67) [hereinafter Casalini], no. 31, at 116–18 (1190 dic. 29); D'Amia 275–76 = Gabriella Maria Dolo, "Le pergamene dell'Archivio di Stato di Pisa dal 1192 al 1196," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1967–68) [hereinafter Dolo], no. 25, at 168–71 (1193 dic. 1); Scalfati 3 no. 155, at 325–26 (1199 ago. 17).

[74] Five cases by my count: Beatrice Carmignani, "Le pergamene dell'Archivio di Stato di Pisa dal 3 maggio 1172 al 18 marzo 1175," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1965–66) [hereinafter Carmignani], no. 27, at 92–96 (1173 lug. 13); D'Amia 265–66 = Maria Lucia Blanda, "Le pergamene dell'Archivio di Stato di Pisa dal 1184 al 1188," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1966–67) [hereinafter Blanda], no. 9, at 28–29 (1184 nov. 28); Michele Amari, ed. and trans., *I diplomi arabi del R. archivio fiorentino* (Florence, 1863), 271–72 = D'Amia 264–65 = Blanda no. 14, at 42–44 (1185 feb. 9); Blanda no. 53, at 179–83 (1188 gen. 15); Casalini no. 21, at 82–85 (1190 feb. 11).

recorded as having made visual inspections of the sites in question.[75] Outside these cases, however, witness testimony and documentary evidence dominate. Up through the middle of the 1170s, they are practically the sole means of proof attested. During that period, all but one attested case record the presentation of either witness testimony or documentary evidence, or both, with witness testimony predominating.[76]

Court-directed party oaths do appear in a few communal cases. In a single twelfth-century case, a Pisan communal court even used an oath in a manner that was consistent with Milanese practice, by directing a party to confirm under oath that his factual allegations were true. In the first case, from December 1162, the plaintiff brought a Roman-law action of mandate (an action for breach of an agency contract) against the defendant, for breach of what was in essence a contract to pay a third-party creditor.[77] The plaintiff presented no proof; the defendant presented sworn witnesses to testify that he had performed the contract as required, but the panel hearing the case observed that it had not found the witnesses to be

[75] Seven cases: Sgherri no. 30, at 144–48 (1159 dic. 16; discussed above; witness testimony also presented); id., no. 72, at 272–81 (1169 nov. 18); Cortesini no. 66, at 279–81 (1171 dic. 29); id., no. 67, at 283–88 (1171 dic. 31); Orlandi, ed. *Carte*, no. 85, at 165–66 (1177 nov. 2); Pellegrini no. 22, at 87–90 (1180 lug. 17); Orlandi no. 181, at 356–58 (1199 mar. 16).
[76] Fourteen cases by my count: Sgherri no. 30, at 144–48 (1159 dic. 16; witnesses, with a site inspection by the panel); Scalfati 3 no. 34, at 59–60 (1160 set. 1; witnesses); Luigina Carratori and Gabriella Garzella, eds., *Carte dell'Archivio arcivescovile di Pisa: Fondo luoghi vari*, vol. 1, *(954–1248)* (Pisa: Pacini, 1988), no. 3, at 6–8 = Maria Luisa Ceccarelli Lemut, "Un inedito documento dell'Archivio arcivescovile di Pisa, riguardante il monastero di Monteverdi e i conti di Castagneto (Pisa, 1161 novembre 9)," *Bollettino storico pisano* 40–41 (1971–72): 42–44 (1161 nov. 9; witnesses); Anna Giusti, "Le pergamene dell'Archivio di Stato di Pisa dal 1157 al 1165," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1967–68) [hereinafter Giusti], no. 50, at 244–47 (1162 dic. 31; witnesses); Sgherri no. 44, at 186–88 (1163 giu. 8; witnesses); Orlandi no. 30, at 56–58 (1163 ott. 12; documentary proof, with the other party held contumacious for failing to take the calumny oath); Giusti no. 69, at 327–33 (1165 mar. 18; witnesses); Scalfati 3 no. 50, at 87–88 (1166 dic. 31; witnesses); Orlandi no. 44, at 82–84 (1169 dic. 29; witnesses); id., no. 45, at 84–86 (1169 dic. 29; witnesses and documents); Cortesini no. 36, at 154–58 (1169 dic. 31; witnesses); id., no. 42, at 180–82 (1170 mar. 21; witnesses); id., no. 63, at 265–71 (1171 nov. 23; witnesses); Orlandi no. 62, at 115–16 (1173 dic. 17; documents).
[77] Giusti no. 50, at 244–47 (1162 dic. 31).

credible. Before issuing judgment for the plaintiff, the panel therefore directed the plaintiff to swear an oath to confirm that he had in fact incurred damages of thirteen pounds from the defendant's failure to pay the third-party creditor as required, much as Milanese panels did under analogous circumstances.[78] In five other twelfth-century cases,[79] the defendant in each case was held "contumacious" for failure to enter an appearance. In each of these cases, the plaintiff did not present proof, but before issuing a default judgment in the plaintiff's favor, the panel directed the plaintiff to swear the calumny oath, the oath each party takes in Roman-canon procedure to swear he or she is not bringing or opposing a claim out of maliciousness or trickery. In these latter cases, the Pisan courts may have been using the calumny oath in effect as a test of the truthfulness of plaintiffs' claims, much as Milanese courts did in cases of insufficient proof. The difference here is that in Pisa, unlike in Milan, the oath was described in terms of the existing Roman-law concept of the *sacramentum de calumnia*. Even when an oath was used in Pisa, it was assimilated to a Romanizing conceptual schema.

The picture I have been painting of the Pisan law of proof looks substantially the same, moreover, if the small corpus of communal cases is expanded to include records of "noncommunal" disputes. By "noncommunal" I mean disputes decided in arbitrations conducted in the area of Pisa by arbitrators selected ad hoc by the parties, cases decided by officials ("consuls") of outlying communities in Pisan territory, and cases decided by judges acting under delegation from the pope in Rome. These cases, although arising in the same geographical area, are diverse in their formal structures. Some records resemble the format of

[78] Id. at 246 ("Fecimus quoque Brunaccianum iurare dicere veritatem quantum de iamscripto debito Guidoni solvisset qui sub iuramento dixit quia libras tredecim ei inde solvit.").
[79] Cortesini no. 14, at 62–64 (1166 nov. 29); id., no. 45, at 189–91 (1170 set. 2); Benedetti no. 43, at 174–76 (1178 giu. 6); Orlandi no. 107, at 205–7 (1181 dic. 2); Scalfati 3 no. 155, at 325–26 (1199 ago. 17).

the November 1159 case between the cathedral chapter canons and Quattromani discussed above, whereas others are formatted quite distinctly. What is important for our purposes, however, is simply that the cases' repertory of proofs is largely the same as that of the communal cases. Out of ten additional cases, covering the period from the earliest mention of judges acting in the name of the commune through the mid-1170s, the defendant is found contumacious in two;[80] in two more, no proofs are mentioned;[81] in one land dispute the adjudicators conduct a site survey in lieu of taking proofs;[82] and in four the parties present proof in the form of witness testimony, documentary evidence, or both.[83] Only in one recorded case, an 1174 decision of a feudal court (*Opetingorum et Gadulingorum consules*, "consuls of the Upezzinghi and the Cadolingi," two related Pisan noble families), was a case decided solely with a party oath. In that 1174 case, the plaintif swore an oath "on the Holy Gospels of God" (*super sancta Dei evangelia*) affirming the truth of his claims in the proceeding.[84]

In short, what comes through clearly from all of the Pisan sources we have seen so far is this: Pisa, unlike Milan, made little use of the party oath as a means of proving cases.

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[80] Cortesini no. 3, at 9–12 (1165 nov. 17; decision of the consuls of the community of Calci); id., no. 24, at 104–8 (1168 lug. 25; same).
[81] Giusti no. 14, at 62–65 (1159 mar. 26; decision of the consuls of the community of Calci); id., no. 57, at 276–78 (1164 feb. 16; ad hoc arbitration).
[82] Sgherri no. 88, at 331–39 (1174 mar. 8; ad hoc arbitration following joinder of issue before a communal judge).
[83] Italia Baldi, "Le pergamene dell'Archivio capitolare di Pisa dall'8 febbraio 1120 al 9 giugno 1156," adv. Ottorino Bertolini (tesi di laurea, Università degli studi di Pisa, 1962–63), no. 67, at 165–67 (1138 nov. 16; ad hoc arbitration; witnesses and documents); Scalfati 2 no. 141, at 260–61 (1142 ott. 19; arbitration under delegation from the archbishop of Pisa; documents); Sgherri no. 16, at 103–9 (1156 feb. 17; sentence of papal judge delegate; witnesses and documents); Scalfati 3 no. 26, at 45–46 (1158 lug. 10; ad hoc arbitration; witnesses).
[84] D'Amia 243–44 = Carmignani no. 47, at 161–64 (1174 lug. 14).

Why did Pisa make relatively less use of the party oath? And how, if it all, did Pisan courts address the perceived proof sufficiency problem discussed by the jurists and evidenced in the Milanese cases?

The question of why Pisan and Milanese practices differ in this respect has no definite answer, but several possible explanations. At least one is not likely. A difference in the relative power of the communal judges of Pisa and Milan to require people to take oaths at their direction is probably not a sufficient explanation. Milan was a remarkably powerful and effective city-state already by the middle of the twelfth century, almost certainly the most powerful commune of northern and central Italy.[85] It would thus be unsurprising to find that Milanese courts were able to make more frequent use than other communal courts of the potentially coercive technique of the oath in order to extract information from trial participants. But Pisan communal judges, for their part, seem to have had no particular hesitation in using oaths whenever they felt an oath was justified. Pisan officials are periodically recorded, for example, as making witnesses swear oaths to tell the truth either before or after testifying.[86]

A slightly more plausible explanation lies in Pisan communal ideology. The eleventh- and twelfth-century community of Pisa self-consciously modeled itself on the ancient city-state of Rome. The remarkably Romanist civic ideology of Pisa is visible in the number of ancient Roman inscriptions that the builders of the city cathedral collected and embedded in

[85] See, e.g., Chris Wickham, *Sleepwalking into a New World: The Emergence of Italian City Communes in the Twelfth Century* (Princeton, N.J.: Princeton Univ. Press, 2015), 217n21 (discussing the unusual power of the early Milanese commune).
[86] See, e.g., Scalfati 3 no. 34, at 59–60 (1160 set. 1); Giusti no. 50, at 244–47 (1162 dic. 31); Sgherri no. 44, at 186–88 (1163 giu. 8).

the walls of the new structure,[87] and in the Latin hexameter poetry composed to celebrate the city's achievements in war with other powers in the Mediterranean, such as the early twelfth-century Latin epic *Liber Maiolichinus* ("Book of Mallorca"), which praised the Pisans' military expedition to the Balearic Islands.[88] As we have already seen, it is also visible in Pisan law, for example, in the Pisan practice of requiring parties to use Roman forms of action in their litigation.[89] In so heavily Romanizing a cultural environment, the marginal position of the oath in theoretical treatments of Roman-canon procedure may well have made heavy use of oaths as means of proof seem "un-Roman" and thus unattractive. As we have seen, Roman procedure as understood by the twelfth-century jurists instead consistently preferred proofs that could be reduced to a discursive, written form: witness testimony and documentary evidence.[90]

The most compelling explanation for the difference in my view, however, is a functional one. In the last decades of the twelfth century, Pisan communal courts and litigants developed an alternative means to the party oath of exploiting parties as sources of proof. In this alternative method, a party bearing the burden of proof was permitted to frame questions of fact that were then put directly to his or her opponent. The opponent, in turn, was required to "confess" or "deny" the truth of the matters raised in the questions. This "question-confession" method appears clearly in the sources beginning in the mid-1170s. Extensive use

[87] See Giuseppe Scalia, " 'Romanitas' pisana tra XI e XII secolo: Le iscrizioni romane del duomo e la statua del console Rodolfo," *Studi medievali*, 3rd ser., 13 (1972): 795.
[88] Carlo Calisse, ed., *Liber Maiolichinus de gestis Pisanorum illustribus: Poema della guerra balearica secondo il cod. pisano Roncioni aggiuntevi alcune notizie lasciate da M. Amari* (Rome: Forzani e C. Tipografi del Senato, 1904).
[89] See generally Emanuele Conte, "Archeologia giuridica medievale: Spolia monumentali e reperti istituzioniali nel XII secolo," *Rechtsgeschichte* 4 (2004): 118–37 (discussing the distinctive Pisan approach to the adoption and study of Roman law).
[90] For an early example of this preference among lawyers trained in Roman law, see Ennio Cortese, *Il rinascimento giuridico medievale*, 2nd ed. (Rome: Bulzoni, 1996), 14–15 (discussing a Tuscan proceeding from 1098).

of oaths to force parties to confirm the truth of their claims was thus, at least in the last quarter of the twelfth century, not strictly necessary in Pisa. Pisa already had a substitute method of accomplishing the same objective.

There is fleeting evidence that already before the mid-1170s, judges in Pisan courts at least occasionally questioned parties directly about matters arising during proceedings; however, the extent to which, if at all, this questioning concerned facts in issue is unclear. In one case, dated December 31, 1171, the parties were involved in a dispute over rights to a tract of land and a vineyard.[91] The plaintiff's claims are set forth explicitly in the record. The defendants' answer is not recorded explicitly, but the record mentions that the defendants, "the hereinbefore written Francardo and Burchia and Alfeo, for themselves and on behalf of their associates," were "examined by us" before the adjudicating panel proceeded to conduct a survey of the land in question.[92] This may mean simply that the panel had sought the defendants' consent to the survey; the record mentions shortly afterward that the panel conducted the survey of one tract of land "with the consent of the hereinbefore written Alfeo" (*concordia iamscripti Alphei*), one of the defendants, and the survey of another tract "with the consent of Francardo" (*concordia Francardi*), another defendant.[93] But it is also possible that the panel was using questioning to clarify each side's litigation position in the dispute.

Whatever power to question the Pisan judges themselves had been exercising before, however, Pisan communal courts began in the second half of the 1170s to transfer a power to question to *the parties themselves*, empowering the parties to ask each other about facts at issue. In a major departure from previous practice in Pisa and elsewhere, parties were thus

[91] Cortesini no. 67, at 283–88 (1171 dic. 31).
[92] Id. at 284 ("[I]nquisitis a nobis iamscriptis Francardo et Buchia et Alpheo, pro se et sociis eorum, mensuravimus […].").
[93] Id. at 284–85.

beginning to be allowed to use not only witnesses and documents, but also their own opponents as sources of proof.

The first attested case of this new, opponent-controlled approach is from April 1178.[94] In the case, the plaintiff Pando, representative of the monastery of San Vito in Pisa, brought an action against the testamentary trustees of Pietro, a decedent, to recover what were apparently rents in kind derived from landholdings that were purportedly held from the monastery: fifty-seven *stai* of high-quality wheat (*granum*),[95] or 282 shillings as a cash equivalent; forty *stai* of millet, or 130 shillings in cash; and fifteen *stai* of beans or seventy shillings cash.[96] The defendant trustees responded that although they had appointed a surety for payment of any eventual judgment against them, they were nonetheless not liable to the monastery; the decedent Pietro had in any case bequeathed the goods in question to others,

[94] Orlandi no. 87, at 168–70 (1178 apr. 24).
[95] On the meaning of *granum* here see Paul Aebischer, "Matériaux tirés de chartes latines médiévales d'Italie pour l'étude du type *blava*," *Zeitschrift für romanische Philologie* 63 (1943): 401 ("blé de la meilleure qualité").
[96] Orlandi no. 87, at 169 ("In eterni Dei nomine, amen. Nos Bonaccursus atque Marignanus et Bandinus Gota, publici foretaneorum iudices, litem et controversiam que vertebatur inter Pandum sindicum sancti Viti, pro ipso monasterio, et Marchesellum et Bernardum atque Moriconem, fideicommissarios Petri et distributores iudicii Petri, sic diffinimus. Si quidem predictus Pandus sindicus sancti Viti, pro ipso monasterio, egit contra suprascriptos fideicommissarios de quinquaginta septem sestariis grani, vel de solidis ducentis octuaginta duobus pro eorum estimatione, et de quadraginta sestariis milii, vel pro eorum estimatione de solidis centum triginta, et de quindecim sestariis fabarum, vel pro earum estimatione de solidis septuaginta, actione ex locato vel conditione triticaria vel certi conditione directis vel utilibus."). The plaintiff expressed his claim in terms of three Roman-law actions: the *actio locati*, an action for breach of a lease contract; a *condictio triticaria*, an action for specific restitution of a loaned quantity of grain; and a *condictio certi*, an action for payment of a specific sum of money owed. Expressing a claim in terms of three separate actions was presumably intended to be a protective measure. If the panel were not convinced that a lease relationship existed, it might still hold that the defendants owed the specified quantities of grain or cash on some other legal theory embraced by the *condictiones triticaria* and *certi*.

they said.[97] The trustees' answer to the plaintiff implied a certain legal theory of the case: that Pietro did not lease the land that had produced the various quantities of crops at issue from the monastery and that he thus had been free to dispose of the crops as he wished.

With the initial pleading completed, the record of the April 1178 now shifts to the proof-taking phase of the litigation. At this point, instead of reporting the usual proofs of witness testimony or documents, the record instead explains that the plaintiff monastery representative, "in order to back up his claim, introduced on behalf of the monastery confessions of the aforementioned persons."[98] The defendant trustees are next reported as "confessing" two sets of facts. They "confessed" (*confessi* […] *fuerunt*) first, that the late Pietro had held certain specific parcels of land of specific sizes in different localities in the territory of the nearby commune of Lucca.[99] They then also "confessed" (*confessi sunt*) that for a period running for thirty years up until his death, Piero "had held all the hereinbefore written pieces of land on behalf of San Vito, for a rent of thirty *stai* of lower-quality wheat, fifteen [*stai*] of higher-quality wheat, and fifteen [*stai*] of either beans or millet; and that Pietro [had] not only [paid] the aforesaid rent for the last three years before his death."[100]

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[97] Id. ("Marchesellus et Bernardus, pro se et Moricone fratre eorum, responderunt pro quo caverunt iudicatum solvi, dederunt fideiussorem Ugonem Marignani, quod non credunt supradicta ei debere, maxime cum ipse Petrus legaverat bona sua aliis […].").
[98] Id. ("[…] Pandus, ad suam fundandam intentionem, pro ipso monasterio confessiones suprascriptorum introducebat.").
[99] Id. ("Confessi namque fuerunt Bernardus et Marchesellus quod Petrus, cuius sunt fideicommissarii, tenuit unum petium ad Sedium Vetus quod <est> stariora quinque, aliud sedium quod est ad Casale, quod est stariora quinque, aliud petium quod est ubi dicitur Salice, quod est stariora sex, aliud est in Piscina, quod est stariora sex, <aliud> in Gremigneto stariora quattuor, <aliud> in via que dicitur Campisina stariora quinque.").
[100] Id. ("Que omnia suprascripta petia confessi sunt Petrum pro sancto Viti, a triginta annis usque ad mortem ipsius Petri, tenuisse ad affictum triginta stariorum de blada, quindecim grani et quindecim inter fabas et milium; et quod affictum predictum Petrus non solum per annos tres proximos sue mortis.").

With these "confessions," the defendants' case seems largely to have collapsed. By admitting that the decedent had held certain land parcels and had paid rents in kind on them to the monastery for at least thirty years, the trustees were in effect conceding that whether or not the monastery had originally held a right to these rents, it had received them for long enough to acquire a right by prescription, since the maximum prescriptive period in Roman law was thirty years. The case record accordingly reports that the panel of judges hearing the dispute, without receiving any further proofs from the parties, issued a judgment for the monastery, awarding cash damages of twenty pounds, about two-thirds of the total cash value claimed.[101]

The meaning of the defendants' "confessions" is not specified in the case record. But whatever the parties were doing, these "confessions" cannot have not meant the same thing as *confessiones* in Roman law and in the writings of the twelfth-century jurists.

For one thing, the defendants here were not simply conceding the plaintiff's case, but were instead giving proof about specific factual issues. In Roman law, as we saw in chapter 1, *confessio* ordinarily meant the admission of the *entire claim* of a party. This concept was refined but otherwise essentially adopted wholesale by the twelfth-century jurists. But here, "confessions" were clearly understood by the notary taking down the case as a form of factual proof, not a part of the exchange of claims and answers that resulted in joinder of issue. The record of the case says this explicitly: it says that the plaintiff

[101] Id. ("Unde nos iudices, secundum ea que coram nobis proposita sunt, electa estimatione librarum viginti tantum ab ipso sindico pro suprascripto monasterio de ipsa blada, prefatos Marchesellus [sic] et Bernardum, pro se et Moricone fratre eorum, fideicomissarios et distributores suprascripti Petri in libris viginti denariorum iamdicto sindico, pro suprascripto monasterio, condempnamus.").

"introduced" them *ad suam fundandam intentionem*, "in order to establish his intention," the standard formula in Pisan cases for the presentation of proof.

Moreover, this proof by "confessions" seems not to have been simply volunteered by the defendants, but instead prompted by adversarial questioning from the plaintiff. The plaintiff, in other words, seems to have been using the defendants as quasi-witnesses for his own case, without the defendants' voluntary cooperation. This conclusion is suggested, although not proven, in the April 1178 case by the fact that the plaintiff is recorded as instigating ("introducing") the defendants' statements. It is also suggested by the fact that the defendants chose to contest the plaintiff's case rather than simply admitting the monastery's claim before joinder of issue. It is possible that the defendants, despite contesting the plaintiff's case, had agreed to answer factual questions at the plaintiff's request. But the absence of any language in the record to suggest party compromise suggests that the defendants were probably not giving evidence by mutual party agreement.

The conclusions about these "confessions" that I have been drawing from the April 1178 case can be strengthened by considering the other twelfth-century cases in which "confessions" appear.

Out of a total of fifty-eight Pisan dispute decisions that survive from the last quarter of the twelfth century, at least nine decisions clearly show the use of "confessions" like the ones found in the April 1178 case. Six of these decisions were issued by adjudicators acting in the name of the Pisan commune;[102] the other three are "noncommunal," issued by

[102] Orlandi no. 87, at 168–70 (1178 apr. 24); Benedetti no. 44, at 177–85 (1178 lug. 3); Scalfati 3 no. 114, at 238–45 (1186 mag. 13); D'Amia 271–72 = Casalini no. 29, at 110–12 (1190 nov. 3); Archivio capitolare di Pisa, fondo diplomatico [hereinafter ACP], no. 715 (1195 ott. 22); Maria Paola De Paola, "Le pergamene dell'Archivio di Stato di Pisa dal 1198 al 1201," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1966-67)

ostensibly privately chosen arbitrators who are not described as "public" or "of the Pisans," or by some other designation implying a connection with the commune.[103] All other decisions from the last quarter of the century, meanwhile, are formally similar to Pisan case records from before the mid-1170s. As before the mid-1170s, defendants were often held contumacious for failure to appear before communal courts, and default judgments were accordingly entered against them without any proofs being presented. Fifteen such case records survive from the last quarter of the century.[104] In a few other cases, neither party was held contumacious, but no proofs are recorded as having been presented; in one of these cases the panel apparently reached its decision by conducting a survey of the land in dispute, without needing proof from the parties.[105] In the remaining cases, both communal and

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[hereinafter De Paola], no. 22, at 92–99 (1199 giu. 8); Scalfati 3, no. 156, at 326–29 (1199 ago. 30). "Confessions" are also mentioned, but are not themselves reported, in ACP no. 751 (1200 apr. 27).

[103] Blanda no. 44, at 133–38 (1187 mar. 28); Orlandi no. 142, at 269–71 (1192 apr. 28); Maria Teresa Alampi, "Le pergamene dell'Archivio di Stato di Pisa dal 1195 al 1198," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, [1968]), no. 15, at 53–57 (1196 apr. 24).

[104] Benedetti no. 37, at 155–56 (1177 dic. 17); id., no. 38, at 157–58 (1177 dic. 17); id., no. 43, at 174–76 (1178 giu. 6); Orlandi no. 101, at 194–95 (1180 ago. 23); Scalfati 3 no. 87, at 161–63 (1181 mar. 5); id., no. 88, at 163–64 (1181 mar. 5); Orlandi no. 107, at 205–207 (1181 dic. 2); Scalfati 3 no. 107, at 211–12 (1182 dic. 22); D'Amia 263 = Pellegrini no. 58, at 276–78 (1183 ott. 20); Scalfati 3 no. 102, at 201 (1183 lug. 11); id., no. 103, at 202–3 (1183 lug. 11); id., no. 115, at 245–46 (1186 giu. 12); D'Amia 272–73 = Casalini no. 31, at 116–18 (1190 dic. 29); D'Amia 275–76 = Dolo no. 25, at 168–71 (1193 dic. 1); Scalfati 3 no. 155, at 325–26 (1199 ago. 17).

[105] Orlandi no. 85, at 165–66 (1177 nov. 2) (site inspection); Benedetti no. 46, at 188–90 (1178 ago. 4); Scalfati 3 no. 93, at 171–72 (1181 dic. 8); id., no. 98, at 193–95 (1182 lug. 6); id., no. 99, at 195–97 (1182 nov. 3); D'Amia 265–66 = Blanda no. 9, at 28–29 (1184 nov. 28); Amari, ed. and trans., *Diplomi arabi*, 271–72 = D'Amia 264–65 = Blanda no. 14, at 42–44 (1185 feb. 9); Blanda no. 53, at 179–83 (1188 gen. 15); Casalini no. 21, at 82–85 (1190 feb. 11).

noncommunal, witness testimony and documentary evidence are the only sources of party proof reported.[106]

These nine decisions strongly suggest that the instigation for the "confessions" made by the defendant came from the plaintiff, who put to the defendant questions of fact that tended to prove the plaintiff's case. In the nine cases, the plaintiff or plaintiffs are described as "introducing" (*introducebat*, *introducebant*), "inducing" (*inducebat*, *induxit*), or "setting out into the middle" (*in medium proponebat*) the defendant's statements. Also suggestive are brief comments in two of the cases indicating that the defendant's "confession" went beyond the scope of the question he or she had been asked.[107] In one of these cases, an inheritance dispute from March 1187, the plantiffs and defendants were disputing which of them was entitled to inherit certain property from a decedent named Rondo del fu Angelo. To demonstrate their right to some of the property, the plaintiffs had apparently had a question put to one of the defendants to induce him to admit a potentially material fact: that the decedent had been indebted to the plaintiffs and that at the time of his death he had held property sufficient to discharge the debt; the defendants were claiming that the decedent's property had passed to them, and not to the plaintiffs as creditors. In recording the

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[106] Nineteen cases: Scalfati 3 no. 67, at 114–17 (1177 set. 28) (witnesses, document); id., no. 68, at 117–22 (1177 set. 28) (witnesses); id., no. 70, at 122–25 (1178 mag. 7) (witnesses); D'Amia 249–51 = Pellegrini no. 10, at 38–43 (1179 dic. 18) (witnesses); D'Amia 247–49 = Pellegrini no. 16, at 61–65 (1180 mar. 20) (document); Pellegrini no. 22, at 87–90 (1180 lug. 17) (documents, with panel site inspection); id., no. 24, at 96–98 (1180 ago. 11) (witnesses); Scalfati 3 no. 84, at 151–53 (1180 ott. 15) (witnesses, documents); Pellegrini no. 25, at 99–103 (1180 dic. 5) (document); D'Amia 253–63 = Pellegrini no. 45, at 207–29 (1182 giu. 3) (documents); Orlandi no. 116, at 222–24 (1183 nov. 21) (witnesses); Scalfati 3 no. 120, at 252–55 (1187 dic. 29) (witnesses); D'Amia 269–70 = Casalini no. 32, at 119–22 (1191 gen. 14) (document); D'Amia 273–75 = Dolo no. 11, at 63–70 (1193 gen. 16) (witnesses, document); Orland no. 183, at 360–62 (1199 apr. 1; documents); De Paola no. 22, at 92–99 (1199 giu. 8; document); Scalfati 3 no. 156, at 326–29 (1199 ago. 30; witnesses); id., no. 157, at 329–31 (1199 ago. 31; witnesses); Orlandi no. 186, at 366–68 (1200 gen. 8) (documents).
[107] See Scalfati 3 no. 114, at 243 (1186 mag. 13); Blanda no. 44, at 135 (1187 mar. 28).

defendant's "confession," the notary had to distinguish between the parts of the response that pertained to the original question and the parts of the response that were the defendant's added commentary. The words in italics are the defendant's additional comments:

> Further, the aforesaid [plaintiff] Don Gualando confessed that he was [the decedent] Rondo's debtor in [the amount of] twelve pounds, and that there were lands in Rondo's control at the time of his death that were worth twenty pounds, *which lands* [*the plaintiff*] *says he holds and are his, not having been asked*, and that the house in which Rondo lived at the time of his death and the orchard were Rondo's, and [that] two mantles and two pairs of pleated skins [?] were in Rondo's house at the time of his death, *which he* [*the plaintiff*] *says he had left at Rondo's house and were his, not having been asked about this* […].[108]

What is important here is not the specific fact pattern of the March 1187 case, but the evidence that this case provides to show that a new practice of party questioning had arisen that treated one party as a source of proof for the other. It is not clear from these cases who—the judge or the party—would have posed these questions to the defendant during the proceeding, the judge or the party. But case records' statements that one party was "introducing" or "inducing" the "confessions" of the opponent implies that the framing of the questions was in the hands of the party who bore the burden of proof.

3.2 **Pisan Legislation**

Further detail about this new means of proof in late twelfth-century Pisan practice emerges from surviving contemporary communal legislation. Pisa is the only Italian city-state from which complete statutory compilations survive from the twelfth century.[109] That

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[108] Blanda no. 44, at 135 ("Item confessus est predictus donnus Gualandus quod fuit debitor Rondi in libris duodecim et quod tot tereni erant apud Rondum tempore mortis qui valebant libras viginti, quos terenos dicit se habere et suos esse, non interrogatus, et domum in qua Rondus habitabat tempore mortis et ortum fuisse Rondi et duo mantella et duo paria pellium de ghiro erant apud Rondum tempore mortis, que dicit se deposuisse apud eum et sua esse, non interrogatus de hoc […].").

[109] Vignoli, *Costituti*, lv.

legislation, the *Constitutum legis* ("Constitution of Law") and *Constitutum usus* ("Constitution of Use"), consists of Pisan statutory provisions covering both local substantive law and the procedure used in communal courts. The earliest extant manuscript text of the *Constituta* was promulgated in 1186; parts of the text, however, date back at least as far as 1160.[110] The 1186 manuscript was then repeatedly commented on and revised with glosses thereafter.

This earliest manuscript, and the glosses that were later added to it, hint that by the mid-1180s a practice of allowing one party to question the other during litigation was already well rooted in Pisan procedure. One 1186 provision specifies that in litigation involving fifty shillings or more of property, judges presiding over a proceeding should make a written record of the plaintiff's "petition" and the defendant's response and "should also write or have written in the files in similar fashion confessions made by any party after the initiation of litigation when another party asks and presses."[111] A similar provision was later added to the *Constitutum legis* in a marginal gloss.[112]

Additional measures adopted after 1186 and written in glosses were directed specifically at parties' responses to questioning. A contemporary marginal gloss on the text of the *Constitutum legis* expresses concern about the danger to parties' souls from false answers

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[110] See id. at xviii, lv.

[111] *Constitutum usus*, rub. 9 (*de placito incipiendo*), in Vignoli, *Costituti*, 165 ("Confessiones etiam post placitum inceptum factas ab aliqua partium si(mi)ll(ite)r in actis, alia parte postulante et insistente, scribant vel scribere faciant."). The key phrase *alia parte postulante et insistente* is admittedly ambiguous. It could also be taken to mean that a party's confessions should be taken down in the record only at the opposing party's request. When the phrase is read in the full context of the passage, however, I think that the interpretation given here is more likely.

[112] Gl. ad *Constitutum legis*, rub. 10 (*de sacramento calumpnie; in quibus causis vel personis prestari debet*), in Vignoli, *Costituti*, 25nbb ("Ordinamus ut iudices post litem contestatam confessiones et negationes quę sibi videbuntur scribende in publicis actis redigant vel redigere faciant.").

and prescribes the types of response that a party may give: "To cut off calumnious subterfuge in litigation, especially when there is danger to the soul, we ordain that no one who is questioned (*interrogatus*) in proceedings, whether subject to the calumny oath or not, shall reply 'I am unsure' (*dubito*), but that his reply should be 'yes' (*sic est*) or 'no' (*non est*) or 'I believe' (*credo*) or 'I do not believe' (*non credo*) […]."[113] A similar gloss appears in the equivalent passage on calumny oaths of the *Constitutum usus*.[114] Another marginal note on the same passage of the *Constitutum legis* warns that "judges must take care to proceed with courtesy and caution concerning questions [*interrogationes*] and responses."[115]

These latter passages of the *Constituta* suggest that at least in some cases courts were compelling parties to answer each other's questions under oath. The 1186 versions of the *Constituta* both make the calumny oath—the oath taken by parties immediately following joinder of issue in Roman-canon procedure—optional in most cases.[116] The statutes provide for the swearing of the oath "if requested" (*si petatur*), expressly permitting the parties to

[113] Gl. ad *Constitutum legis*, rub. x (*de sacramento calumpnie; in quibus causis vel personis prestari debet*), in Vignoli, *Costituti*, 25nbb ("Calumpniosam causarum tergiversationem et maxime ubi anime est periculum amputantes, constituimus ut nullus in causis cum sub sacramento calumpnie vel sub legalitate de facto proprio interrogatus respondeat 'dubito', s(et) sit responsio eius 'sic est' vel 'non est' vel 'credo' vel 'non credo' […].").
[114] Gl. ad *Constitutum usus*, rub. *De sacramento calumpnie. X*, in Vignoli, *Costituti*, 167no ("Calumpniosam causarum tergiversationem et maxime ubi anime est periculum amputantes, constituimus ut nullus in causis cum sub sacramento calumpnie vel sub legalitate de facto proprio interrogatur respondeat 'Dubito;' s(et) sit responsio eius 'Sic est' vel 'Non est' vel 'Credo' vel 'Non credo.' ").
[115] Gl. ad *Constitutum legis*, rub x (*de sacramento calumpnie; in quibus causis vel personis prestari debet*), in Vignoli, *Costituti*, 26nbb5 ("[S]tudeant autem iudicantes circa interrogationes et responsiones cum benignitate et cautela procedere.").
[116] Nearly identical language can be found in the later, early thirteenth-century version edited by Bonaini. See Francesco Bonaini, *Statuti inediti della città di Pisa dal XII al XIV secolo* (Florence, 1870), 2:677, 847.

"delay or dispense with" the oath if they wish.[117] All the same, the oath must have been administered to the parties in some proceedings. Indeed, the texts of the oath prescribed for plaintiff and defendant in the 1186 version of the *Constitutum usus* both appear to impose a requirement of truthfulness on a party responding to questioning. The oath administered to the defendant calls on him to "confess" (*confessus* […] *eris*) and not to "make a fraudulent denial" (*non negabis fraudulenter*) if questioned (*interrogatus*) on a matter on which he knows the plaintiff to be speaking the truth.[118] This language very likely covers, in my view, the questions that parties could put to their opponents in order to induce "confessions" of fact.[119]

* * *

We can sum up the results of this examination of the source material in Pisa: a new technique of obtaining proof from the parties themselves, an alternative to using party oaths, emerges from the Pisan case records in the late 1170s. In this alternative, party-controlled method, the party bearing a burden of proof framed questions of fact that were then put to the

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[117] *Constitutum legis*, rub. 10 (*de sacramento calumpnie; in quibus causis vel personis prestari debeat*), in Vignoli, *Costituti*, 22; *Constitutum usus*, rub. 10 (*de sacramento calumpnie*), 165.

[118] *Constitutum usus*, rub. 10 (*de sacramento calumpnie*), in Vignoli, *Costituti*, 166 ("Tu ita iurabis quod si cognoveris in toto hoc placito adversarium tuum vel alium pro eo veritatem dicere de eo quod petet vel de aliqua re que ad placitum pertineat, interrogatus ab eo vel ab aliquo pro eo iuditiali auctoritate confessus inde eris et non negabis fraudulenter.").

[119] An interesting possible parallel can be found in the late twelfth- or early thirteenth-century legist *ordo Sapientiam affectant omnes*, which reports explicitly that the calumny oath used in Montpellier encompassed a duty of truthfulness: "In Montpellier this custom is observed, [namely] that the parties swear that they [will] tell the truth according to the opinion of their soul[s] in every same thing that they are asked by the judge; and the same in many parts of the world." Knut Wolfgang Nörr, "Päpstliche Dekretalen in den *ordines iudiciorum* der frühen Legistik," *Ius commune* 3 (1970): 6 (quoting Douai, Bibliothèque municipale, MS 649, fol. 3rb ("[A]pud [M]ontem [P]esulanum hec obseruatur consuetudo, ut parties iurent se uerum dicere secundum animi opinionem in omni eodem quo fuerint a iudice requisiti, et idem in multis partibus mundi.")).

opposing party. The opposing party was then required to respond truthfully, at least in some cases under oath, with a "confession" if he or she believed that the factual proposition raised in the question was true.

The informational advantages of this alternative approach to using parties as sources of evidence over the approach that we saw in Milanese practice are readily apparent. One advantage is that this alternative would have enabled the court to exploit the parties' own knowledge to frame better factual questions about the dispute. A party, with his or her superior knowledge of the underlying dispute, could formulate questions for his or her opponent that might not have occurred to the judges themselves. Another advantage of this alternative is that it avoided the all-or-nothing character of the party oath. In Milan, the panel hearing a case would typically ask the party it found more persuasive to swear to the truth of its *entire claim*. In Pisa, by contrast, the "question-confession" method we have been discussing allowed for a dispute to be broken down into a number of smaller, discrete factual issues and, on at least some of these smaller issues, made it possible to find common factual ground between the parties.[120]

[120] Niklas Luhmann has discussed the legitimating function that is served by the breaking down of the main decision of a proceeding into many smaller "partial decisions" (*Teilentscheidungen*) placed within the control of the parties themselves. Such partial decisions constrain the parties' subsequent procedural action while leaving open the ultimate outcome of the proceeding. See Niklas Luhmann, *Legitimation durch Verfahren* (Neuwied am Rhein, Ger.: Luchterhand, 1969), 40.

4. INITIAL DISSEMINATION OF THE OPPONENT-CONTROLLED APPROACH

4.1 Dissemination in Practice within Tuscany

The courts and arbitral panels of Pisa were as far as I have been able to ascertain the first tribunals anywhere in Italy to take an alternative, party- or opponent-controlled approach toward using parties as sources of proof. For this reason it seems more probable than not that Pisan courts and practitioners invented the technique of questions and confessions that we saw in some of the Pisan case; however, a definitive answer on the question can only ever be reached after analysis of *all* surviving judicial decisions, arbitral awards, and other procedural materials from late twelfth-century central and northern Italy and southern France.

In any case, that Pisans at least *could* have devised a major innovation in Roman-canon procedure should not surprise us given Pisa's status in the late twelfth century as an important center of Roman law. The evidence for a possible organized "school" of Roman law at Pisa in the twelfth century is inconclusive.[121] There is nonetheless clear evidence that Roman law was actively learned and practiced in Pisa. This evidence includes the fact that Pisa was the home of the principal surviving manuscript of the *Digest*, known to the glossators as the *litera Pisana*, from at least the middle of the twelfth century.[122] Also pertinent is the fact that Pisa was the base of operations of Burgundio of Pisa, the jurist responsible for translating the Greek-language passages of the *Digest* into Latin so that they

[121] See Peter Classen, *Studium und Gesellschaft im Mittelalter*, ed. Johannes Fried (Stuttgart: Hiersemann, 1983), 39–43; Ennio Cortese, "Intorno agli antichi iudices toscani e ai caratteri di un ceto medievale," in *Scritti in memoria di Domenico Barillaro* (Milan: Giuffrè, 1982), 27.

[122] See Hermann Kantorowicz, "Über die Entstehung der Digestenvulgata," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 30 (1909): 203.

could be read and applied by Western lawyers.[123] Perhaps most telling, Pisa was already known to the Bolognese glossators as a center for procedural innovation in particular. The Bolognese professor Johannes Bassianus famously singled out for praise "the most learned city of the Pisans" (*prudentissima Pisanorum civitas*) for "wisely" (*sapienter*) requiring that the plaintiff state the specific form of action he or she is bringing in his or her pleading.[124]

Whether Pisa in fact invented the new approach or not, variants on the Pisan question-confession method first emerge in the records of other Tuscan communes in the 1190s, suggesting at the very least that the new approach was probably a regionally specific development in its initial stages.

An illustration of this dissemination within Tuscany is provided by the communal and ecclesiastical courts and arbitral panels of Lucca, a city about twelve miles inland and to the northeast of Pisa, and its surrounding territory.[125] Lucchese case records, especially those from the 1170s and 1180s, are distinctive in the extent to which they report parties' claims and arguments in detail. But at least up through the mid-1190s, there is no clear evidence that parties were permitted to use one another as sources of evidence, as in Pisa. The exchange on

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[123] On Burgundio, see generally Peter Classen, *Burgundio von Pisa: Richter, Gesandter, Übersetzer* (Heidelberg: Winter, 1974); see also Hermann Lange, *Römisches Recht im Mittelalter*, vol. 1, *Die Glossatoren* (Munich: Beck, 1997), 242–46 (collecting and summarizing earlier literature); Giovanna Murano, "Burgundio da Pisa," in *Dizionario biografico degli giuristi italiani*, ed. Italo Birocchi et al. (Bologna: Il mulino, 2013), 1:363–64.

[124] Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 4, fasc. 2, *Die* summa *"Quicumque vult" des Johannes Bassianus* (Innsbruck: Wagner, 1925), 5–6 ("Et prudentissima Pisanorum civitas inter cetera, quae sapienter disposuit et observat, secundum quod accepi, nomen actionis in libello exprimere constituit.").

[125] For a much more extensive description and analysis of the Lucchese cases and the style of argument evidenced in them, see generally Wickham, *Courts and Conflict*, 16–107.

the record of party claims and assertions seems instead to have had the function of clarifying and narrowing the issues in dispute that were before the adjudicating panel.

An example of the Lucchese style of case record from the 1170s and 1180s is an October 1172 case before a panel of communal judges.[126] In this case, the parties to the ligation were Ugo del fu Ugo Angeli and his wife Agnese, against Morettino del fu Bartolomeo and three of his nephews or grandsons. Ugo seems to have inherited rights to parcels of land that his opponent alleged were held in fief to Morettino and Morettino's father Bartolomeo. When Ugo refused to pay rents to Morettino, Morettino retaliated by interfering with the collection of rents from Ugo's own tenants.[127]

Like most Lucchese case records, this October 1172 record begins with an invocation ("In the name of God the Father"), followed by a narration that names the location of trial, the witnesses to the proceeding, the adjudicators, and the parties and an account of the controversy. In this instance, Ugo claimed from Morettino a series of land rents (*fructus seu pensiones*), some paid in cash, others in kind, whose payment he said Morettino had blocked over a period of about a year. He also claimed restitution of a bell that he alleged Morettino had stolen, or alternatively ten shillings in damages. Further, he requested damages for Morettino's interference with his enjoyment of three pieces of land near the village of Lunata outside Lucca. Morettino replied with a denial (*que fere omnia Morettinus facere inficiebatur*). For his part, Morettino sought restitution of several pieces of land along with a tithe payment. Ugo responded with a denial.

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[126] Archivio di Stato di Lucca [hereinafter ASL], Archivio dei notari 11 ott. 1172.
[127] Complex chains of subinfeudations were a common feature of land tenure in Lucchese territory. See Chris Wickham, *Community and Clientele in Twelfth-Century Tuscany: The Origins of the Rural Commune in the Plain of Lucca* (Oxford: Clarendon Press, 1998), 24.

The narration of initial claims and denials is then followed in the record by a lengthy exchange of further party assertions and responses. This exchange seems to have had the function of defining more clearly the issues in dispute between the parties. In this case, most of the assertions seem to be directed toward demonstrating either that the disputed land parcels were held in fief to Morettino or that they were not. But the parties' assertions do not distinguish strictly between the factual and the normative. The following exchange of assertions and responses is illustrative[128]:

> Morettino said that Malanotte used to pay thirty *denari* from the land on the basis of a written lease. Ugo confessed that Pagano del fu Moretto had paid the aforesaid pension on the basis of a written lease, and that Malanotte [had held these lands] in freehold, because he said that so much time had stood after the conclusion of the written lease that [the lands] had become a freehold tenancy. And he asserted that the aforesaid lands and properties had been acquired through the written lease. Morettino denied this and alleged that [the lands] had been given in fee and that a pension of five *soldi* had been fixed in the form of a written lease over the fee, which Ugo denied.

Following this exchange, the record implies that witness testimony was heard. The court then issued judgment for Morettino in all but one of his land claims, ordering Ugo "that he restore to said Morettino the ancient fief of their house." They also ordered Morettino to stop interfering with Ugo's collection of rents from his subinfeudated tenants.

Cases following the pattern of the October 1172 proceeding, with extensive reporting of the parties' exchanges of arguments defining their disputes, are common in proceedings

[128] ASL Archivio dei notari 11 ott. 1172, ll. 27–29 ("Morettinus dicebat quod [M]alanotte exinde reddebat denarios triginta per libellum. Ugo confitebatur Paganum quondam Moretti reddidisse predictam pensionem per libellum, et Malanottem eas per tenimentum quia dicebat tantum temporis stetisse post libellum finitum que facte era[n]t tenimentum, et [a]sserebat predictas terras et res per libellum acquisitas quod Morettinus negabat et allegabat in feudum fuisse datas et nomine libelli supra feudum pensionem quinque solidorum fuisse statutam quod Ugo negabat.").

before communal judges in the 1170s and 1180s.[129] What we do not see in these cases, unlike contemporary cases from Pisa, are clear signs of parties being permitted to question one another to obtain proof of their claims.

In the course of 1194, however, a procedural mechanism like the Pisan question-confession method seems to have been abruptly introduced into Lucchese procedure. The source of the new procedure was a statutory reform. Mention is made in two cases from 1194 of a new procedure implemented by recent legislation, an *ordo novi constituti* ("order of procedure of the new legislation").[130]

In one of these two cases, from August 1194, Luprando, advocate for a local hospital, was party to a proceeding before a communal court against Piero of Camaiano.[131] After naming the parties and the judges, the record proceeds as usual to set forth the parties' claims.

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[129] See, e.g., ASL S. M. Corteorlandini 17 set. 1170; ASL Archivio dei notari 11 ott. 1172; Pietro Guidi and Oreste Parenti, eds., *Regesto del capitolo di Lucca*, 3 vols. (Rome: Loescher (vols. 1–2); Istituto storico italiano (vol. 3), 1910–33) [hereinafter RCL], no. 1334 (2 nov. 1174); ASL S. Giovanni 20 lug. 1175; RCL no. 1355 (10 feb. 1176); RCL no. 1392 (9 nov. 1178); ASL Fiorentini 12 apr. 1188; RCL no. 1399 (13 apr. 1179); RCL no. 1400 (23 giu. 1179); RCL no. 1428 (29 dic. 1180 [1179]); RCL no. 1425 (18 dic. 1180); RCL no. 1478 (17 ago. 1182); RCL no. 1530 (13 nov. 1185); ASL S. Nicolao 8 dic. 1187; ASL S. Giovanni 9 set. 1188; ASL S. Giovanni 21 ott. 1188; ASL S. Giovanni 22 ott. 1188; ASL S. M. Forisportam 27 ago. 1188; RCL no. 1586 (30 mar. 1189); ASL S. M. Corteorlandini 29 dic. 1190; ASL S. Ponziano 17 feb. 1190; ASL Spedale di S. Luca 28 ago. 1190; ASL Spedale di S. Luca 11 ott. 1190. Compare, however, the less extensive records in ASL Fiorentini 13 set. 1175 (defendant held contumacious); ASL S. M. Corteorlandini 10 dic. 1175 (parchment damaged); RCL 1370 (13 apr. 1177) (contumacious defendant); ASL S. M. Forisportam 14 mar. 1179; ASL Spedale di S. Luca 14 mag. 1187; RCL no. 1562 (19 set. 1187); RCL no. 1576 (17 giu. 1188). Three other cases, which may or may not have lain before communal officials, survive from these years only in brief summaries in registers of the Archivio capitolare di Lucca: RCL no. 1485 (1182); RCL no. 1603 (31 dic. 1189 [1188]); RCL no. 1623 (1190).

[130] ASL S. Frediano 16 ago. 1194; RCL no. 1722 (24 ott. 1194). Because no Lucchese legislation whatsoever survives from the twelfth century, we are reliant on these cases for indirect evidence of the content of the law. See [Salvatore Bongi], *Inventario del R. archivio di Stato in Lucca* (Lucca, 1876), 2:295.

[131] ASL S. Frediano 16 ago. 1194.

In this case Luprando sought (*petit*) restitution of an undivided one-half share of two parcels of land. In the alternative, if Piero "does not wish to do these things" (*si hec facere non vult*), Luprando (*petit*) sought a fixed annual rent in kind or, if Pierus would not agree to that arrangement either, restitution of half of the one-half share of land and a smaller fixed annual rent payment. Piero responded with a general denial (*Pierus negat facere omnia suprascripta.*).

At this point, the case record reports an exchange that resembles the party questions and confessions used in Pisa. The record states that, first, the calumny oath was sworn by the parties. The calumny oath, to recall, is the oath taken in Roman-canon procedure after joinder of issue and immediately before the proof phase, by which the plaintiff swore that he or she was not bringing a claim, and the defendant swore that he or she was not opposing the plaintiff's claim, out of maliciousness or trickery (*calumnia*). This oath was taken, according to the case record, "in accordance with the order of procedure of the new legislation" (*secundum ordinem novi constituti*), and it was to have effect "as long as the proceeding continued" (*dum causa duraverit*).[132] The record then recounts a series of factual assertions made by the plaintiff Luprando, much like the party questions in Pisa, and the responses of the defendant. Unlike the parties' claims earlier in the record, which are all introduced with the Latin verb *petit* ("he claims"), these assertions are each introduced with the Latin verb *dicit* ("he says"), drawing a clear distinction in the record between legal claims in the pleading phase of the proceeding and factual proof in the proof phase. Plaintiff Luprando, representing his hospital, offers a series of statements tending to show that the hospital had in the past received rents from the disputed land; Piero denies some and confesses others.

[132] In a further change, the oath taking is specifically dated to March 16. See id., ll. 13–14 ("Sacramento calumpnie facto dum causa duraverit secundum ordinem novi constituti septimo decimo Kal. Apr. […].").

Luprando's assertions at times cover multiple propositions, which Piero denies and confesses separately. Luprando states, for example, that "Sabatino, who was Piero's father-in-law, and Morello tilled said land on behalf of the church and hospital of San Giovanni *de capite burgi* and used to pay five *stai* of grain in rent." Piero first "denies everything" but then confesses in part that Sabatino did indeed formerly make payments of five *stai* of grain to the hospital, but not as rent for the lands in controversy.[133] When Luprando states that Piero's wife had already made a settlement agreement, with Piero's permission, to pay rent to the hospital, Piero concedes that an agreement was made but denies that the agreement received his permission.[134] The communal judges are then reported as closing the proceeding by issuing judgment for the hospital; they order Piero to pay the hospital five *stai* of grain in annual rent.

In my view, this method of allowing one party to obtain proof from the other by an exchange of assertions and responses is functionally identical to the question-confession method we have already seen in Pisa from the 1170s onward. Indeed, the sudden introduction of the method by communal legislation in 1194 suggests that the technique likely was borrowed from Pisa. In Lucca, the method is regularly attested in proceedings before communal courts from 1194 onward.[135] Indeed, the use of a new abbreviation, S.C.F.

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[133] Id., ll. 14–16 ("[D]icit Luprandus quod Sabatinus qui fuit socer Pieri et Morellus laboraverunt predictam terram pro ecclesia et hospitali sancti Iohannis de Capite Burgi, et reddebant inde quinque staria grani. Pierus negat omnia confitetur tamen quod Sabatinus reddebat quinque staria grani set non de predictis terris.").

[134] Id. ll. 16–20 ("[D]icit Luprandus quod uxor Pieri voluntate Pieri convenit et promisit Castellano qui tunc erat advocatus ecclesie et hospitalis sancti Iohannis pro ipso hospitali solvere et dare annuatim sex staria grani et tria staria et medium grani pro parte Morelli et duo et medium pro parte sua de supradictis terris. Pierus confitetur conventionem factam fuisse si placeret sibi Piero et dicit quod non habuit ratum neeque firmum nec vult habere.").

[135] Other communal cases with confessions from 1194 through the end of the twelfth century include ASL S. Giovanni 7 mag. 1194; ASL Fiorentini 28 nov. 1194; RCL no. 1728 (21 gen. 1195); RCL no. 1729 (28 feb. 1195); RCL no. 1749 (22 nov. 1195); ASL Fregionaia 15 dic. 1195; RCL no. 1764 (9 mar. 1196); ASL Fregionaia 19 lug. 1196; RCL no. 1783 (2 giu. 1197); ASL Archivio di Stato 7 feb. 1198; RCL no. 1802 (14 dic. 1198); RCL no. 1816 (18

(*sacramento calumpnie facto*), in several case records from the second half of the 1190s[136] suggests that the practice of swearing the calumny oath and then exchanging party assertions and confessions rapidly became a matter of routine in Lucchese communal procedure.[137]

A comparable adoption of something resembling the Pisan question-confession method appears also to have taken place to the southeast of Lucca and Pisa, in the commune of Siena and its surrounding territory. A sign that Sienese parties were used as sources of evidence, although admittedly not unambiguous, appears in a case from February 1187. The case was an ecclesiastical proceeding held at Quercegrossa, a small settlement outside Siena, before a panel of papal judges delegate.[138] The case was a dispute between two female convents about whether the abbess of one held the right of choosing, installing in office ("instituting"), and requiring obedience from the abbess of the other. In a recital of the evidence that they had reviewed before pronouncing judgment, the judges delegate mention that in addition to witness testimony and documentary proof ("with the allegations of each party having been seen and heard, and with instruments and [witness] statements […] having

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giu. 1199); ASL S. M. Corteorlandini 9 feb. 1200; RCL no. 1826 (1 apr. 1200); ASL S. Frediano 26 apr. 1200; ASL S. Nicolao 26 mag. 1200.

[136] See, e.g., ASL S. Giovanni 7 mag. 1194; ASL Fiorentini 28 nov. 1194; ASL Fregionaia 19 lug. 1196. There are also communal cases from 1194–1200 without confessions: ASL Altopascio 8 mar. 1199 (defendant held contumacious); ASL S. Ponziano 9 ott. 1200.

[137] This procedure was not always used in *noncommunal* proceedings in the 1190s, however, including proceedings before ecclesiastical courts. For examples of cases without party confessions, see ASL S. Frediano 7 mag. 1195 (arbitral panel; ambiguous); ASL S. M. Forisportam 29 mar. 1197 (arbitral panel); ASL Guinigi* 12 nov. 1199 (papal judges delegate); ASL S. M. Forisportam 3 ago. 1199 (judges delegate); ASL S. Ponziano 4 nov. 1200 (arbitral panel). For examples with party confessions, see ASL Spedale di S. Luca 5 feb. 1196 (judge delegate of a local lord; follows *ordo novi constituti*); ASL S. Nicolao 30 mar. 1199 (arbitral panel; no oath mentioned); RCL no. 1813 (23 apr. 1199) (follows *ordo novi constituti*; before sole arbitrator?); ASL Fiorentini 5 dic. 1199 (sole arbitrator; no oath mentioned); ASL Altopascio 10 feb. 1200 (arbitral panel; no oath mentioned); ASL S. Nicolao 16 set. 1200 (similar).

[138] Antonella Ghignoli, ed., *Carte dell'Archivio di Stato di Siena: Abbazia di Montecelso (1071–1255)* (Siena: Accademia senese degli Intronati, 1992), no. 46, at 101–4 (1187 feb. 17).

been read through"), they had also considered the "confessions" of the abbesses: "with the confessions that each abbess—having been adjured in virtue of the Holy Spirit and for the sake of her obedience that they owe to Blessed Peter and to the venerable father of monasteries Blessed Benedict—made in our presence also having been heard […]."[139] Such a reference to "confessions" made by both parties, possibly under oath but in any case with a special warning from the court to be truthful, strongly suggests that some form of questioning of the parties to obtain factual evidence must have taken place, but whether this questioning came from the judges delegate or from the parties themselves is unclear.[140]

Whatever really took place in the February 1187 ecclesiastical proceeding, unambiguous evidence of the adoption of something like the method that we found in Pisa appears in the Sienese sources about a decade later. As was the ordinary practice in Roman-canon procedure, the party-chosen arbitrator in a proceeding from the mid- to late 1190s concerning the ownership of a certain piece of property had drawn up written *attestationes* ("attestations") recording his examination of the parties' witnesses.[141] The *attestationes* end

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[139] Id. at 103 ("Visis igitur et auditis allegationibus utriusque partis et instrumentis atque attestationibus que a memoratis viris recepte et fideliter conscripte fuerunt perlectis et privilegiis nichilominus Romane ecclesie in quibus deprehendimus ecclesiam sancte Marie in Colle monasterio Montis Cellensis esse subiectam diligenter intuitis, confessionibus etiam quas utraque abbatissa aiurata in virtute Spiritus Sancti et illius [obe]dientie obtentu quam debent beato Petro et venerabili patri monasteriorum beato Benedicto coram nobis fecerunt auditis, habito consilio prudentum virorum tam divinarum quam humanarum legum, abbatissa sancte Marie in Colle contumaciter absente, tibi Recordate abbatisse Montis Cellensis et his que post te in eiusdem monasterii amministratione succedent electionem et institutionem abbatissarum sancte Marie in Colle adiudicamus […].").

[140] Another Sienese case in which mention is made of parties "confessing" is an arbitral award from January 1187. See Eugenio Casanova, ed., "Il cartulario della Berardenga," *Bullettino senese di storia patria* 26 (1919): 257–58 (no. 479; 1187 gen. 11). But I think it is somewhat more likely that in this case the defendants "confessed" as part of a negotiated settlement with the plaintiffs.

[141] Antonella Ghignoli, ed., *Carte dell'Archivio di Stato di Siena: Opera metropolitana (1000–1200)* (Siena: Accademia senese degli Intronati, 1994), no. 105, at 238–41 (date uncertain: possibly 1195, 1197, or 1198).

with standard language indicating that "the aforesaid attestations were read and published" in the presence of the parties and in front of a number of witnesses.[142]

Immediately following these *attestationes* on the same parchment document, however, are what are labeled "confessions of each party" (*confessiones utriusque partis*). These begin with a summary of the claim brought by the plaintiff in the proceeding, an archpriest who was acting on behalf of the cathedral chapter of Siena and who was represented in the hearing by his proctor, a priest named Dono. The archpriest, the record reports, brought a series of Roman-law and local Sienese statutory actions to claim from the defendant both ownership and possession of a certain piece of land, basing the claim on a written grant issued by the Holy Roman Emperor.[143] There follows in the record a series of assertions made by the plaintiff's proctor Dono and corresponding responses by the defendant. Each party, the record notes, is put under oath. The assertions and responses do not strictly distinguish between law and fact. For example, the plaintiff's proctor begins the exchange by making both a legal claim—that the chapter holds title and possession of the land in dispute—and a factual allegation—that the defendant and the defendant's father have paid a *pensio*, a cash rent on the land, to the chapter *per longissimum tempus*, i.e. for at least thirty years, the prescriptive period for adverse possession.[144] The defendant gives a similarly

[142] Id. at 240 ("Lecte et publicate sunt predicte attestationes Sen(is), in ecclesia sancti Christophori volentibus litigatoribus et presentibus […] coram […] pluribus testibus.").
[143] Id. ("Archipresbiter petit nomine Senensis canonice a Rimprecto plateam positam iuxta cellarium quod fuit Boniki et tavernas et ex alia parte detinet filius Frederigi, ante est via, retro canonice, proponens rei un(de) utilis vel directe condict(ionem) ex L, condict(ionem) sine causa vel ex iniusta causa et ex constituto Senensi et act(ionem) in factum r(e), loco, interdict(ionem) unde vi termino iudic(ii), offici(um) et omne ius competentes et petit propriet(atem), scilicet presbiterum Donum, pro privilegio a domino Henrigo imperatore Romanorum sibi concesso.").
[144] Id. ("Dicit dominus archipresbiter quod pro concessione quam fecit canonica de platea unde lis est, credit ipsam spectare ad canonicam et suam esse quantum ad proprietatem et

mixed response and counter-assertion: that the land in dispute "does not belong to the chapter either as to ownership or as to possession […], and he says that he and his ancestors have had and held the land for themselves for fifty years and longer on the basis of a deed of sale, for the price of fifty pounds."[145] Indeed, neither party "confesses" any of the propositions of the other party, and the record closes with a notation by the judge that he had "reduced" the parties' exchange "to public form for perpetual memory and proof."[146]

The practice evidenced by these *attestationes* from the mid- to late 1190s is attested again in another Sienese procedural document from late 1199.[147] In this document, from litigation before a communal judge, only the parties' exchange of assertions and responses are given; witness testimony is transcribed in a separate document.[148] The form of the exchange is, however, identical to that of the previous case. The plaintiff is reported as making a series of assertions under oath, to which the defendants respond with denials and counter-assertions.

We can thus conclude that by the late 1190s Siena, like Lucca, had adopted the new, opponent-controlled approach to the use of parties as sources of proof.

4.2 Dissemination in the Doctrinal Literature: *Invocato Christi nomine*

The new, opponent-controlled approach to using parties as sources of proof, which we saw in Pisa in the 1170s and then saw adopted in other parts of Tuscany in the 1190s, enters

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possessionem et per longissimum tempus est pensionata canonice et a Bernardino et Rimprecto eius filio, et idem credit presbiter Donus sacramento calumpnie.").

[145] Id. ("Rimprectus dicit sacramento calumpnie quod platea unde lis est nec spectat ad canonicam nec quod ad proprietatem nec quod ad possessionem nec sua est et dicit se et suos antecessores habuisse et tenuisse ipsam pro suo per L annos et plus et titulo emptionis et pro pretio VIIII librarum.").

[146] Id. at 241 ("in publicam formam redegi ad perpetuam memoriam et probationem").

[147] Id., no. 107, at 244–46 (intorno al 1199 dic. 22).

[148] Id., no. 106, at 241–44 (1199 dic. 22).

into the doctrinal literature of Roman-canon procedure at the very end of the twelfth century in a legist *ordo iudiciorum* commonly known to scholars as *Invocato Christi nomine* ("With Christ's name having been invoked").[149] What is known about the composition of the text helps to lend some credence to the account that I have just sketched of the development of a new mechanism for obtaining proof in late twelfth-century Tuscan practice. Authorship of the text was long attributed to the Bolognese glossator Pillius of Medicina; the modern scholarly near-consensus, however, is that the primary author of *Invocato Christi nomine*, although heavily reliant on earlier work of Pillius, was in fact a certain Bencivenne of Siena, and that the text was completed during or shortly after 1198, likely in Siena but in any event somewhere in Tuscany.[150]

Bencivenne's treatment of the new approach appears in *Invocato Christi nomine* under a rubric *De interrogationibus et confessionibus factis post litem contestatam* ("On

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[149] Modern editions: Friedrich Christian Bergmann, ed., "Pillii Medicinensis summa de ordine iudiciorum," in *Pillii, Tancredi, Gratiae libri de iudiciorum ordine* (Göttingen, 1842), 1–86; Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 5, fasc. 1, *Der* ordo *"Invocato Christi nomine"* (Heidelberg: Winter, 1931). There is also one early modern edition: *Pilei Ivreconsvlti Vetvstissimi Opus, seu ordo, de ciuilium atque criminalium causarum iudicijs.* […] (Basel, 1543).

[150] The thesis that the author of *Invocato Christi nomine* was a Bencivenne rather than Pillius was advanced by Emil Seckel in an essay revised by Erich Genzmer for publication after his death; Seckel also suggested that this could be the same Bencivenne who appeared as a *iudex* in Sienese documents. Emil Seckel, "Über die dem Pillius zugeschriebene *summa de ordine iudiciorum Invocato Christi nomine*," ed. Erich Genzmer, *Sitzungsberichte der Preußischen Akademie der Wissenschaften: Philosophisch-historische Klasse* 17 (1931): 393–417. For the main arguments, see Mario Caravale, "Bencivenne da Siena," *Dizionario biografico degli italiani* (Rome: Istituto della Enciclopedia italiana, 1966), 8:215–16; Linda Fowler-Magerl, Ordo iudiciorum vel ordo iudiciarius*: Begriff und Literaturgattung* (Frankfurt am Main: Klostermann, 1984), 120–21. To my knowledge the last serious attempt to argue against authorship by this Bencivenne of Siena is Otto Riedner, review of *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, vol. 5, fasc. 1, *Der* ordo *"Invocato Christi nomine,"* by Ludwig Wahrmund, and *Über die dem Pillius zugeschriebene* summa de ordine iudiciorum *"Invocato Christi nomine,"* by Emil Seckel, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 22 (1933): 488–94.

interrogatories and confessions made after joinder of issue").[151] In Bencivenne's terminology, as in Pisan practice, an *interrogatio post litem contestatam* is a question that is posed to a party after joinder of issue; a *confessio* is the opposing party's response, which serves as a form of or replacement for proof.

At first glance, these legal concepts look familiar. The Latin term *interrogatio*, when discussed in conjunction with joinder of issue, had been up until *Invocato Christi nomine* a term of art in Romanist procedural theory. As we saw in chapter 1, in classical Roman procedure as understood by the glossators, the term *interrogationes in iure* ("interrogatories before the magistrate") was used to designate the questions that the magistrate was permitted in limited circumstances to put to the defendant before joinder of issue in order to clarify certain preliminary issues arising above all in inheritance disputes.[152] The possibility of using these *interrogationes* in proceedings received relatively little attention among the twelfth-century procedural writers. Bencivenne, unusually, deals at some length with them in the part of his text that describes the pleading phase leading up to joinder of issue; he calls them *interrogationes ante litis contestationem* ("interrogatories before joinder of issue").[153]

Bencivenne's treatment of these *interrogationes ante litis contestationem* is not in itself remarkable either. The text follows the twelfth-century consensus that we saw in chapter 1, which held that "interrogatories" of this type could be asked only about an

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[151] Bergmann, "Pillii Medicinensis Summa," pt. 2, § 11, at 31–34; Wahrmund, *Quellen*, vol. 5.1, pt. 2, tit. 24 (*De interrogationibus et confessionibus factis post litem contestatam*), at 46–48 (with variant titles).
[152] See ch. 1, text accompanying notes 118–24.
[153] Bergmann, "Pillii Medicinensis Summa," pt. 1, §§ 10–12, at 19–22; Wahrmund, *Quellen*, vol. 5.1, pt. 1, tit. 13 (*In quibus casibus fiunt hodie interrogationes ante litis contestationem*), at 27–28; id., tit. 14 (*In quibus causis fiunt hodie interrogationes ante litem contestatam*), at 28–30.

enumerated list of preliminary factual issues.[154] Indeed, not even the text itself of Bencivenne's treatment is entirely original. Parts of the discussion of *interrogationes ante litis contestationem* that appears in *Invocato Christi nomine* appear to share a common archetype with parts of the discussion of the same subject in another, almost exactly contemporary *ordo iudiciorum*, the text *Quia utilissimum fore vidi*.[155] For example, *Quia utilissimum fore vidi* and *Invocato Christi nomine* share language discussing the legal effect of a party's answer to an *interrogatio ante litis contestationem*.[156] Similarly, the two manuals share almost verbatim a passage explaining why *interrogationes* must be posed to the defendant before, not after, joinder of issue.[157] Since both texts are known to draw heavily on

[154] See ch. 1, text accompanying notes 119–24.
[155] See Fowler-Magerl, Ordo iudiciorum, 110. *Quia utilissimum fore vidi* is reported in two manuscripts: Vatican City, Biblioteca apostolica vaticana, MS Chigi E VII 211, fols. 62ra–66va; Vatican City, Biblioteca apostolica vaticana, MS Ottob. lat. 1298, fols. 65va–69va.
[156] Compare Vatican City, Biblioteca apostolica vaticana, MS Chigi E VII 211, fol. 63va, and Vatican City, Biblioteca apostolica vaticana, MS Ottob. lat. 1298, fol. 67ra ("Predictarum interrogationum effectus hic est ut respondens sic teneatur actione qua adversus eum agitur, ac si contraxisset non quod horiatur ex confessione actionem set quia actio quam actor volebat intendere, sic intentabit post confessionem ac si is qui confessus est verum contraxisset in eo quod respondit […]"), with Bergmann, "Pillius Medicinensis summa," pt. 1, § 12, at 21, and Wahrmund, *Quellen*, vol. 5.1, pt. 1, tit. 14 (*In quibus causis fiunt hodie interrogationes ante litem contestatam*), at 29 ("Effectus autem istarum interrogationum hic est, ut qui respondet: sic, teneatur ea actione, qua adversus eum agitur, acsi contraxisset. Non quod ex confessione oriatur actio quia de actione, quam actor volebat intentare, sic intentabit post confessionem, acsi is, qui confessus est, vere contraxisset in eo, quod respondit").
[157] Compare Vatican City, Biblioteca apostolica vaticana, MS Chigi E VII 211, fol. 63rb, and Vatican City, Biblioteca apostolica vaticana, MS Ottob. lat. 1298, fol. 67ra ("nam ecce sic dicitur in predicta lege de etate § qui iusto [Dig. 11.1.11.10], quod ille qui confessus est falsum sine culpa que dolo proxima sit debet absolvi. hoc autem non posset stare, in eo quod confessus est post litem contestatam. si enim is qui post litem contestatam aliquod factum confessus est debet absolvi. ergo non restituitur in eo casu minor, set iure ipso tutus est, set in ff. de confessis dicitur quod minor restituitur a confessione."), with Bergmann, "Pillius Medicinensis summa," pt. 1, § 12, at 21–22, and Wahrmund, *Quellen*, vol. 5.1, pt. 1, tit. 14 (*In quibus causis fiunt hodie interrogationes ante litem contestatam*), at 30 ("Item dicitur, quod ille, qui confessus est falsum culpa, debet absolvi, ut ff. eod. l. de etate, § qui iusto [Dig. 11.1.11.10]. Sed hoc non posset stare in eo, qui confessus est post litem contestatam. Si enim is, qui post litem contestatam aliquod falsum confessus est, debet absolvi de iure communi,

prior writings of Bolognese jurists—Albericus and Johannes Bassianus, in the case of *Quia utilissimum fore vidi*, and Pillius, in the case of *Invocato Christi nomine*[158]—we can assume as a working hypothesis that Bencivenne's treatment of *interrogationes* made before joinder of issue was likely dependent on the writing, now lost, of one of these Bolognese jurists. To this extent Bencivenne's discussion was nothing new.

The second Latin term that Bencivenne uses, *confessio*, is also familiar from classical Roman procedure as the glossators understood it. We saw in chapter 1 that in the understanding of the twelfth-century glossators, *confessio* usually meant the voluntary admission by a defendant of the entire claim of the plaintiff, ordinarily made as an answer to a plaintiff's claim in the phase of trial leading up to joinder of issue.[159]

What *is* likely new in *Invocato Christi nomine*, however, is the peculiar, expanded meaning that Bencivenne gives to each of these familiar terms, *interrogatio* and *confessio*. Whereas before an *interrogatio* had usually meant only a preliminary question posed to a party before joinder of issue, Bencivenne now appears to accommodate earlier Roman doctrine to the new approach to the use of parties as sources of proof that we have seen in Tuscan practice. In *Invocato Christi nomine*, an *interrogatio* now could mean a question put to a party on any subject matter *after* joinder of issue, at the beginning of the proof phase of a proceeding. The word *confessio*, meanwhile, also takes on a new meaning in Bencivenne's treatment. He implies that the answer to an *interrogatio* of this type, although not an admission of the entire claim of the opposing party, was nonetheless subject to the same legal principles that ordinarily would govern a full confession. He stresses that it was this legal

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ergo non restituitur in eo casu minor, sed iure communi tutus esset. Verum in titulo de confessis dicitur, quod minor a sua confessione restituitur.").

[158] See Fowler-Magerl, Ordo iudiciorum, 110–12, 120–21; Seckel, "Über die dem Pillius zugeschriebene *summa*."

[159] See generally ch. 1, pt. 5.

meaning of confession and not a religious or other sense of the word that applied: "[I]t should be understood that in confessions made after joinder of issue, there is no occasion for [sc. spiritual] penitence, and no retraction of confessions can be made, since a party who has confessed before the magistrate is treated as a party against whom judgment has been issued, as per Cod. 7.59.1."[160] Accordingly, Bencivenne makes clear that the usual exceptions that allow a party to retract a confession also applied to confessions in this context, for example the principle that a party who makes a confession in mistake of fact is not bound by his or her confession.[161]

Furthermore, by combining elements of the classical Roman law of *interrogationes in iure* with principles of the twelfth-century glossators' law of confessions, Bencivenne imposes restrictions on the behavior of the responding party that the twelfth-century glossators had not previously applied. The classical Roman law governing *interrogationes in iure* sanctioned attempts by defendants to evade questions put to them about preliminary matters concerning the dispute. Thus a defendant who refused to respond to an *interrogatio* was deemed to have responded in the affirmative, as was any defendant who responded "obscurely" (*obscure*).[162] Bencivenne now imposed these requirements on a party responding to *interrogationes* made after joinder of issue as well.

Overall, there is much in Bencivenne's account of interrogatories and confessions made after joinder of issue that I have left unmentioned. There is also much that is left unresolved in Bencivenne's treatment. One significant omission: Bencivenne never clarifies

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[160] Bergmann, "Pillii Medicinensis Summa," pt. 2, § 11, at 32; Wahrmund, *Quellen*, vol. 5.1, pt. 2, tit. 24 (*De interrogationibus et confessionibus factis post litem contestatam*), at 46–47.
[161] See Bergmann, "Pillii Medicinensis Summa," pt. 2, § 11, at 31; Wahrmund, *Quellen*, vol. 5.1, pt. 2, tit. 24 (*De interrogationibus et confessionibus factis post litem contestatam*), at 47. For further discussion, see infra chapter 3, text accompanying notes 5–6.
[162] See Dig. 11.1.11.7.

whether it was in fact the party bearing the burden of proof who was responsible for framing the interrogatories themselves. What is reasonably clear, however, is that in *Invocato Christi nomine* a Tuscan author adopts a way of describing a regional practice—the opponent-controlled approach to the use of parties as sources of proof that I have argued is detectible in the Pisan, Lucchese, and Sienese case records—in terms of existing concepts of Roman law, expanded to suit this new purpose.[163]

4.3 **Early Signs of Wider Dissemination**

In the years immediately following the composition of *Invocato Christi nomine*, signs begin to appear of a wider dissemination of a new approach to the use of parties as sources of proof.

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[163] To reiterate earlier statements of caution: the suggestion made in this chapter that the technique of interrogatories has a specifically Pisan or more generally Tuscan origin rests on only a preponderance of the current evidence. A more secure conclusion will require, at minimum, a broader survey of northern Italian and especially southern French case records than has been possible for this dissertation. One reason for special caution is that interrogatories are also discussed briefly in a second legist *ordo*, *Sapientiam omnes affectant*. For that discussion, see Douai, Bibliothèque municipale, MS 649, fol. 3vb (explaining that following the calumny oath, "Item fiunt interrogationes in iudicio, et ab actore reo, et a reo actori. primo tamen debet requiri qui interrogationem fieri uult per sacramentum quod credat, et postmodum alterum. Tales autem debent fieri interrogationes, que uel concesse uel negate adeo prebeant cause adminiculum […]"). I have avoided discussing *Sapientiam omnes affectant* here because its date and provenance remain for the time being too uncertain. Proposed dates of composition range from before 1187–91 to after 1206. As for the place of composition, proposals vary, but the coeditor of a forthcoming critical edition of the text informs me that he and his coeditor support what is probably the majority view, namely that *Sapientiam omnes affectant* has a southern French provenance. See Yves Mausen, email message to author, August 11, 2019; see also Fowler-Magerl, Ordo iudiciorum, 130–33 (reporting other MSS and summarizing the debate on date and place of composition). The treatment of interrogatories in *Sapientiam omnes affectant* is then taken up again in a derivative canonist *ordo* from France, *Scientiam omnes naturaliter appetunt*, and expanded. See Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 2, fasc. 1, *Der* ordo judiciarius *"Scientiam"* (Innsbruck: Wagner, 1913), tit. 27 (*de interrogationibus faciendis*), at 44–50.

Certainly within Tuscany the new approach had already become routine in the communes whose sources we have been examining, although different communities followed different standard local practices. In decisions of arbitral panels and communal courts from the area of Pisa, party interrogatories and confessions appear in many, though not all, of the cases from the first decade of the thirteenth century. Standard practice in Pisa called for the record to report that the party bearing the burden of proof had "induced" the confessions of his or her opponent as of proof of his claim,[164] Pisan records also only reported those facts to which the responding party had "confessed," and any such confessions were clearly indicated by forms of the appropriate Latin verb (*confiteor*, "to confess").[165] Not all decisions by Pisan communal courts report party confessions, but some noncommunal decisions do, suggesting that interrogatories and confessions were a technique in general use in Pisan territory, and not specific to the communal courts. Examples of such noncommuncal decisions include a sentence by a papal judge delegate and an award by two party-chosen arbitrators.[166]

In Lucca, too, the use of the new approach seems to have been routine in proceedings in communal courts from the first decade of the thirteenth century.[167] The practice in Lucca

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[164] See, e.g., Fiorella Nuti, "Le pergamene dell'Archivio di Stato di Pisa dal 1200 al 1204," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1965–66), no. 42, at 195–96 ("At Nicholaus ad ea que intendebat probanda, confessiones suprascripti Benencase sindici communis pro communi pro se inducebat, confitentis quod […].").

[165] See, e.g., id. at 194–97 (1203 gen. 14); Archivio capitolare di Pisa, fondo diplomatico, no. 774 (1203 giu. 20) [hereinafter ACP]; ACP no. 782 (1204 lug. 10); ACP no. 785 (1204 feb. 4).

[166] See Maria Laura Ricci, "Le pergamene dell'Archivio di Stato di Pisa dal 1208 al 1213," adv. Silio P. P. Scalfati (tesi di laurea, Università degli studi di Pisa, 1981), no. 2, at 5–13 (1207 apr. 13; arbitral award); ACP no. 800 (1208 apr. 20; sentence of papal judge delegate).

[167] Cases from the first decade of the thirteenth century from the Archivio di Stato: ASL Spedale di S. Luca 10 feb. 1201; ASL S. M. Forisportam 16 mag. 1201; ASL Altopascio 12 mar. 1202; ASL S. Giovanni 7 dic. 1204; ASL S. Ponziano 17 ott. 1205; ASL Archivio dei notari 14 nov. 1206; ASL S. Ponziano 4 dic. 1207 (special intercommunal arbitral panel for disputes between Lucchese and Pisan citizens); ASL S. Frediano 13 ott. 1208; ASL Altopascio (deposito Orsetti-Cittadella) 10 apr. 1209; ASL S. Croce 12 lug. 1209; ASL

shows slight local differences. Unlike in Pisa, statements of parties bearing the burden of proof were framed as assertions, identified with forms of the Latin verb *dico*, "to say," rather than as questions. The responding party's answer was recorded whether or not the answer affirmed the assertion of the party bearing the burden of proof; denials (*negat*, *negabat*) were also recorded. Another difference from Pisan practice was that the use of party confessions seems only to have been routine in the communal courts.[168]

More significant for our purposes, however, is that the opponent-controlled approach, always with local variation, was also quickly gaining acceptance in courts well outside Tuscany after the turn of the century. In Genoa, as we have seen, notarial registers from the late 1100s record many judicial and arbitral decisions in some detail but show no clear sign of an opponent-controlled approach to the use of parties as sources of proof. This changes already in 1200, when a register attributed to the Genoese notary Giovanni di Guiberto records detailed notes of party pleadings in three cases. In each of these cases the new approach we have already seen in Tuscany makes an appearance.

In one of these cases, the notary records an action for *iniuria* brought by plaintiff Baldoino de Cruce against defendant Petrino, son of Giovanni Cristiano di Gavi, before a panel of two arbitrators.[169] The *actio iniuriarum* was form of action granted in Roman law to

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Archivio dei notari 17 mar. 1210. Only two communal decisions housed in the Archivio di Stato from this period

[168] I know of no Lucchese communal-court definitive sentence from the first decade of the thirteenth century in which both parties appeared before the court (i.e., neither party was contumacious) but party confessions were not used. The one possible exception is ASL S. Ponziano 26 gen. 1204, which may not be a final judgment. But absence of confessions seems to have been the norm for noncommunal decisions from the Lucchesia in this period. See ASL S. Giovanni 7 ott. 1203 (party-chosen arbitral panel); ASL Spedale di S. Luca 27 mag. 1205 (same); ASL S. Frediano 26 set. 1207 (same); ASL S. M. Corteorlandini 30 gen. 1209 (same).

[169] M. W. Hall-Cole, H. G. Krueger, R. G. Reinert, and R. L. Reynolds, eds., *Giovanni di Guiberto (1200–1211)* (Genoa: R. deputazione di storia patria per la Liguria, 1939), no. 100,

recover damages for physical or dignitary harm. In this case, the notary reports, Baldoino alleged in his pleading that Petrino had struck his wife in the head with a stone. He also alleged that Petrino had thrown stones at him and had run after him with sworn drawn, and that if he had not fled, and other men had not come to separate them, he too would have been struck by Petrino. Baldoino claimed a hundred shillings in damages for the *iniuria* against his wife, and another forty shillings for the *iniuria* against him personally.

After reporting Baldoino's claim, the notary then records three further steps taken in the proceeding. Two are routine. He states that the parties committed their dispute to two arbitrators. He also states that Giovanni Cristiano, Petrino's father, granted permission to Petrino to participate in the proceeding; permission was presumably needed because Petrino remained in the legal power of his father. The third step is new. The notary records a set of factual assertions, which he calls *positiones* ("positions"), and one response resembling the interrogatories and confessions used in Tuscany. Baldoino's assertions, and Petrino's single response, read as follows:

> Positions of Baldoino against Petrino son of Giovanni Cristiano. Baldoino posits [*ponit*] that Petrino son of Giovanni Cristiano struck Scibona Baldoino's wife with a stone against her head. Petrino replied: he does not believe it. Baldoino further posits that the aforesaid Petrino ran after the aforesaid Baldoino with knife drawn, wanting to strike the aforesaid Baldoino.[170] [No answer is recorded.]

The form of the assertions and responses used here, and in the other two cases in the same notarial register, differs slightly from the forms used in Pisa and Lucca. Instead of the Pisan

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at 1:61–62 (1200). For the other cases, see id., no. 93, at 1:44–47 (1200); id., no. 94, at 1:47–48 (1200).

[170] Id., no. 100, at 62 ("Positiones Balduini contra Petrinum filium Iohannis Christiani. Ponit Baldoinus quod Petrinus filius Iohannis Christiani percuxit Scibonam uxorem Baldoini ei de lapide uno in capitem. Respondit Petrinus non credit. Item ponit Baldoinus quod predictus Petrinus cucurit post Baldoinum predictum evaginato cultello volens percurrere Baldoinum predictum.").

pair *interrogo/confiteor*, or the Lucchese pair *dico/confiteor*, here we find the Latin verb pair *pono/respondeo*. What seems clear, however, is that the basic technique is the same: a party is being allowed, or possibly required, to use his opponent as a source of proof of the factual allegations supporting his claim.

Essentially the same technique appears shortly afterward in another notarial register, this time several miles down the Mediterrean coastline in the commune of Savona. This register, kept by a notary in Savona named Martino, consists largely of records of steps taken in communal court cases between 1203 and 1206, including a great number of party *positiones* of the type just seen in Genoa.[171] Martino clearly understood these *positiones* and *confessiones* as a particular type of procedural action, since he kept all of the "positions" he had recorded separately in two sections of his register, introducing each section with an explanatory heading.[172]

A single extended example from the register will suffice to show that what Martino calls "positions" and "confessions" constitute the same technique of proof that parties had already been using in Genoa and Tuscany. Sometime in 1203, a certain Iacopo Tega brought an action for restitution of possession of an olive grove from defendant Abbone *scriba*, the actual possessor. Tega's pleading states several supporting factual allegations. He alleges that the olive grove had been the property of a certain Oberto Gabuto at the time of his death. Gabuto had instituted his son as his testamentary heir, providing that if his son predeceased

[171] On the contents of the register, see Dino Puncuh, ed., *Il cartulario del notaio Martino: Savona, 1203–1206* (Genoa: Società ligure di storia patria, 1974), 14–19; see also Antonio Padoa-Schioppa, "Giustizia civile e notariato nel primo Duecento comunale: Il caso di Savona, 1203–1206," *Studi medievali* 55 (2014): 1–24 (evaluating the register as a source for legal history).

[172] See Puncuh, *Il cartulario*, nos. 362–449, at 121–91; id., nos. 802–85, at 333–83. The first section heading reads: "In Dei nomine Iesu Christi, amen. Incipiunt positiones et confessiones tempore domini Guilielmi Guertii, Saonensium potestatis, facte. MCCIII, indictione VI, die XVIII novembris." Id. at 121.

him, his son's heir would take; that if his son predeceased him and left no heir, several other people would take in his stead; and apparently (here the text is lacunose) that if any of these other people were dead, the survivors would take that person's share ratably. Tega was himself the heir of the only survivor.[173]

Abbone must have answered Tega's pleading with a denial, because on November 18, 1203, Martino recorded a series of "positions" of Tega, along with Abbone's answers. The positions and responses read in full:

> Positions of Iacopo Tega against Abbone *scriba*. Iacopo Tega posits that the olive grove that he Iacopo claims from Abbone was Oberto del fu Gabuto's and that he Oberto held and possessed it. Abbone replies: he does not believe it. He further posits that when the aforesaid Oberto Gabuto came to death, he made over all his property to his son Vivaldino, and if Vivaldino died without heir, [he provided] that that property would go to Oberto Spasanti and Giacobino and Guglielmo Tega and Bellenda, except for the site of the tower of the Gabuti up as far as the house that formerly belonged to Guasco the blacksmith, in which landholding he did not want for the aforesaid Bellenda to have a share. Abbone replies: if there is a document to that effect, he believes it. He further posits that the aforesaid Oberto Gabuto said that if any of the aforesaid persons died without heir, each would take in place of the other. Abbone replies: he believes it, if there is a document to that effect. He posits further that all the aforesaid persons died before Guglielmo Tega without heir. Abbone replies: he believes it. He posits further that he Iacopo is heir of the aforesaid Guglielmo Tega. Abbone replies: he believes it. He further posits that the aforesaid Oberto Gabuto made out a conveyance, and that it was written by the hand of a public notary. Abbone replies: if he sees an instrument made by the hand of notaries of the city of Savona, he believes it, otherwise not. He further posits that the aforesaid Oberto Gabuto held and possessed the abovenamed olive grove at the time of his death. Abbone replies: he does not believe it.[174]

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[173] Id., no. 3, at 27 (n.d.).

[174] Id., no. 363, at 121–22 ("Positiones Iacobi Tege contra Abbonem scribam. Ponit Iacobus Tega quod olivetum quod petit ipse Iacobus Abboni fuit Oberti quondam Gabuti et ipsum tenebat et possidebat ipse Obertus. Respondet Abbo: non credit. Item ponit quod quando Obertus Gabutus predictus venit ad mortem, ipse iudicavit omnia sua bona filio suo Vivaldino, et si Vivaldinus moriretur sine herede, quod bona illa remanerent Oberto Spasanti et Iacobino et Wilielmo Tege et Bellende, preter sedium turris Gabutorum usque ad domum que fuit quondam Guaschi ferrarii, in quo sedio nolebat quod predicta Bellenda haberet

The aim of these positions was clearly to prove the allegations given in Tega's pleading: that Oberto Gabuto had held title to and rightful possession of the olive grove at the time of his death, and that he, Tega, was the rightful heir to the grove under Gabuto's will, since all other alternative heirs named in the will other than Guglielmo Tega had predeceased Gabuto and since he, Tega, was Guglielmo's own heir. Abbone's litigation strategy, meanwhile, seems to have been to attack Tega's theory of the case at its root, by arguing that, however Gabuto had tried to dispose of his property in his will, Gabuto had not held rightful title to or possession of the olive grove in the first place.

This exchange of positions and responses was not the end of the dispute. A few pages after Tega's positions, Martino records that Abbone presented his own positions ten days later, on November 28, 1203. Martino observes that, apparently unlike Tega, Abbone requested that both parties be sworn.[175] Abbone then submitted the following positions, revealing his full litigation strategy:

> Abbone posits that the olive grove in dispute formerly belonged to Oberto Spasanto. Iacopo Tega replies: he does not believe it. He posits further that the aforesaid Oberto Spasanto held and possessed the olive grove during the [life]time of Oberto Gabuto. Iacopo replies: he does not believe it. He posits further that the aforesaid Oberto Spasanto sold

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partem. Respondet Abbo: si carta inde est credit. Item ponit quod Obertus Cabutus predictus dixit quod si aliquis predictorum moriretur sine herede quod unus succederet alii. Respondet Abbo: credit, si inde carta est. Item ponit quod omnes predicti sunt mortui ante quam Wilielmus Tega, sine herede. Respondet A(bbo): credit. Item ponit quod ipse Iacobus est heres predicti Wilielmi Tege. Respondet A(bbo): credit. Item ponit quod Obertus Gabutus predictus fecit iudicatum, et est scriptum per manum publici notarii. Repondet Abbo: si viderit instrumentum factum per manum tabellionum civitatis Saone, credit, alioquin non. Item ponit quod predictus Obertus Cabutus tenebat et possidebat supradictum olivetum tempore sue mortis. Respondet Abbo: non credit.").

[175] See id., no. 367, at 123 ("Facta est calompnia utriusque partis, preter de Saono, fratre ipsius Iacobi, a quo petit ipse Abbo calompniam.").

> the olive grove to the aforesaid Abbone. Iacopo replies: he believes it, because he saw the instrument [of sale].[176]

Abbone's theory of the case is now clear. His contention was that not Oberto Gabuto, as Tega claimed, but one Oberto Spasanto had held rightful title and possession to the olive grove, and that a clear chain of title ran from Oberto Spasanto to him, Abbone.

The dispute between Tega and Abbone dragged on for more than a year after the second set of positions and responses. On January 16, 1204, a nine-month continuance was granted to Abbone to allow him to produce witnesses who were then currently abroad.[177] Each party then produced witnesses, whose testimony Martino recorded in his register; the testimony of Abbone's witnesses was read out on January 24, 1205.[178] Ultimately, on March 16, 1205, a Savonese communal court issued a sentence for Tega, ordering Abbone to relinquish possession of the grove.[179]

Although Martino recorded many other similar cases in his register, the example of the dispute between Iacopo Tega and Abbone is sufficient for our purposes. We see from it that in Savona, as in Genoa, "positions" are factual propositions, formulated by the party bearing the burden of proof, to which the opposing party is required to respond, sometimes under oath. They are clearly the local variant of the same, opponent-controlled approach to the use of parties as sources of proof that we have been examining.

Having detected the emergence of the new approach in Genoa and Savona, we can now turn again, finally, to Milan, bastion of the court-directed party oath. Among the records

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[176] Id. ("Ponit Abbo quod olivetum unde lis est, fuit quondam Oberti Spasantis. Respondet Iacobus Tega: non credit. Item ponit quod predictus Obertus Spasantus tenuit et possedit ipsum olivetum tempore Oberti Gabuti. Repondet Iacobus: non credit. Item ponit quod Obertus Spasantus predictus vendidit ipsum olivetum predicto Abboni. Respondet Iacobus: credit, quia vidit instrumentum.").
[177] Id., no. 591, at 250.
[178] Id., no. 783, at 304–5; see also id., no. 776, at 297 (n.d.).
[179] Id., no. 893, at 385.

of actions of the consuls of Milan is a document from December 1204 in which a Milanese consul directs that an authenticated copy be made of the "pleadings and confessions and a record" (*libellos et confessiones et inbreviaturam*) from a factually complex litigation proceeding begun the previous May between Ariprando, archpriest of the church of Monza, north of Milan, and one Iacopo Pellucco, of Milan; the relevant items are reproduced below the order.[180]

The record first reports the pleadings. According to the pleadings the archpriest, represented by Milanese counsel, sought among other things partition of two tracts of land that had apparently been held in common between the church of Monza and defendant Iacopo. The archpriest also requested that the court order Iacopo either to provide water or allow the archpriest to bring water via a ditch to his part of one of the tracts, and he requested compensation for "all the fruits" (*omnes fructus*) that Iacopo had extracted from the property in excess of his share. Iacopo counterclaimed for damages and interest for the archpriest's interference with *his* property interests in the disputed land.[181]

After giving a transcription of the parties' pleadings, the record goes on to report "the contents […] of the confessions" ([*t*]*enores* […] *confessionum*) of the parties. The presentation of these *confessiones* lacks the clean formal consistency of the Tuscan *interrogationes* and *confessiones* and the Genoese and Savonese *positiones* and *confessiones*, hinting that the technique may not yet have become routinized in Milanese procedure. To record the archpriest's positions, the notary uses sometimes the Latin verb *ponit* ("he posits"), other times the verb *dicit* ("he says"), whereas Iacopo's responses are recorded sometimes with the verb *respondit* ("he replied"), other times with the verb *dixit* ("he said"). The

[180] Manaresi no. 276, at 381–84 (1204 dic. 31).
[181] See id. at 381–82.

positions themselves were not even all recorded on the same day: one set is dated July 16, 1204; a second set was taken down the following day; and a third set, without responses, was recorded months later, on November 3.[182] All the same, even a cursory examination makes clear that Milanese courts were beginning to use the same technique of proof we have been watching spread elsewhere. The first set of positions and responses gives a sense of the whole:

> Anno Domini 1204, Friday, the 16th day of July, 7th indiction. In the presence of Don Guglielmo Menclocio, consul of Milan, Guglielmo Burro, counsel of the church of San Giovanni of Monza [representing the plaintiff archpriest], posits in the name of that church that Iacopo Pellucco or his representative took for six years the proceeds from the meadow that formerly belonged to the Lazzaroni [i.e., one of the properties in dispute]. To which Iacopo himself replied [with] what Iacopo [and] what his sons took for six years from the aforesaid proceeds[?],[183] but the said Iacopo said that he invested more [than the proceeds were worth] in improving said meadow of the Lazzaroni; which last thing Guglielmo denies. Guglielmo himself posits further that the said Iacopo or his representative took for six years the proceeds of the meadow of the Lazzaroni. This the said Iacobo said he did not know or did not believe, except for two years in which he took those proceeds for the sake of his sons. Iacopo *de Puteo*, on the order of the consul, recorded.[184]

Although the syntax of this exchange is not entirely straightforward, the basic similitude between these positions and responses and those we have seen elsewhere in Italy remains clear. As in the cases we have seen elsewhere, the plaintiff archpriest here was trying, with at

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[182] See id. at 383–84.

[183] Here the text is garbled.

[184] Manaresi no. 276, at 383 ("Anno Domini M. CC. IIII., die veneris, .XVI. die iullii, indictione .VII. Coram domino Guilielmo Menclocio consule Mediolani ponit Guilielmus Burrus sindicus ecclesie Sancti Iohannis de Modoecia nomine ipsius ecclesie quod Iacobus Pelluccus aut eius missus habuit per sex annos fructus prati quod fuit de Lazaronis. Ad quod ipse Iacobus respondit quid ipse Iacobus, quid filii eius habuerunt predicti fructus per sex annos, sed dixit ipse Iacobus quod errogavit plus in aptando ipso prato de Lazaronis; quod ultimum ipse Guilielmus diffitetur. Item ponit ipse Guilielmus quod ipse Iacobus aut eius missus habuit per sex annos fructus prati de Lazaronis. Quod ipse Iacobus dixit se nescire nec creddere nisi per duos annos in quibus eos fructus habuit gratia filiorum eius. Iacobus de Puteo iussu illius consulis scripsit.").

most partial success, to induce the defendant to admit factual allegations underlying his claim: in this case, the allegation that for six years Iacopo had taken all of the revenue from one of the disputed land tracts that the church of Monza and Iacopo had until now held in common. Moreover, the survival of three additional sets of "positions" and responses from other proceedings in the first decade of the thirteenth century confirms that the technique was making inroads in Milanese communal procedure.[185]

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I have been sketching out an account of the first signs of dissemination of a new, opponent-controlled approach to the use of parties as sources of proof into areas of Italy outside Tuscany: Genoa and Savona in Liguria, and Milan in Lombardy. But what in fact is the relationship among twelfth-century Tuscan practice, *Invocato Christi nomine*, and the sudden appearance of "positions" and "confessions" in the sources of Genoa, Savona, and Milan?

The scenario that I consider more likely than not, as I have been suggesting throughout this chapter, is that the new approach was first devised and applied in the 1170s by the courts of Pisa, a city already to known to legal historians as an important innovator in medieval Roman law. By the mid-1190s, the variations on the technique of "interrogatories" and "confessions" had spread from Pisa to other cities in Tuscany, notably Siena and Lucca. Thereafter, in the first years of the 1200s, the new approach can be detected elsewhere, under a different name (positions, *positiones*), but in otherwise essentially the same form.

It is impossible to say at this stage of our knowledge of the primary sources with certainty what exactly the relationship is between the Tuscan interrogatories of the 1170s to

[185] Id., no. 306, at 421–22 (1207 nov. 2); id., no. 310, at 425 (1208 feb. 25); id., no. 335, at 453–54 (1210 gen. 11).

the 1190s and the positions found in Genoa, Milan, and Savona in the 1200s. The scenario I consider more probable than not is that knowledge of the new approach spread from Tuscany to other areas using Roman-canon procedure, possibly following in the wake of the publication in or shortly after 1198 of *Invocato Christi nomine*, and that courts elsewhere began applying a version of the new approach in the early 1200s. An independent origin is also possible, although in my view slightly less likely.

Ultimately, however, the exact priority and chronology of adoption of the new approach are of little significance. What matters most for our purposes is simply that, beginning in the last decades of the twelfth century, a transfer of procedural power from the adjudicator to the parties is visible in courts applying Roman-canon procedure in different parts of Italy, as courts started to adopt a new approach to the use of parties as sources of proof that enabled a party to formulate "interrogatories" or "positions" to which his or her opponent was required to respond, often under oath. It is this shift in power that will help to explain the emergence of the thirteenth-century doctrinal developments discussed in the next chapter.

5. CONCLUSION

In this second chapter I have argued that, at least in part in order to mitigate the problem of proof insufficiency raised in chapter 1, twelfth-century courts and arbitral panels in different parts of central and northern Italy took two approaches to exploiting the parties themselves as sources of proof. The older approach, exemplified by Milan, placed full power in the hands of the adjudicator. It called for the adjudicator to resolve factual uncertainty in appropriate cases by compelling one of the parties to swear an oath confirming the truth of part or all of his or her claim (part 2). The newer approach, exemplified by Pisa and first

attested there in the 1170s, shifted power to the party bearing the burden of proof. It allowed that party to frame specific factual "interrogatories" or "positions" and to compel the other party, sometimes under oath, to respond (part 3). I have charted the dissemination of a new, opponent-controlled approach first within Tuscany, then in the doctrinal literature (*Invocato Christi nomine*), and finally elsewhere in Italy (part 4). One explanation for this rapid dissemination, I have suggested, is functional: the technique of *interrogationes* and *positiones* was epistemically superior to the older approach because it relied on parties, with their deeper knowledge of the facts of the dispute, rather than adjudicators to develop lines of factual inquiry against one another.

I will next turn in chapter 3 to the doctrinal response to this development in procedural practice.

CHAPTER 3

THE EMERGENCE OF THE LAW OF POSITIONS

1. INTRODUCTION

In the previous chapter I charted the appearance in Tuscan and northern Italian primary sources of interrogatories and positions (*interrogationes* and *positiones*), a new approach to using parties as sources of proof. In this new approach, a party had access to his or her opponent as a source of proof. One party formulated questions or propositions of fact to which the other party was required to respond.

In this third chapter I now examine the doctrinal literature that emerges in the thirteenth century in response to the development of interrogatories and positions: the Roman-canon law of positions. My central theme is that although at first the thirteenth-century lawyers concentrated simply on defining interrogatories and positions in acceptable doctrinal terms, they were soon obliged to respond to the stresses that the new technique of proof put on responding parties. That doctrinal response took the form of norms of admissibility limiting parties' use of interrogatories and positions. The major purposes of the rules of admissibility, I suggest, were to protect parties from potentially abusive examination by their opponents and to mediate the tension between parties' factual inquiries and the informational needs of adjudicators.

In what follows I first survey the doctrine of the new law of positions. I suggest that although initially concerned mainly with defining the concept of the position and ensuring that the new technique was an effective means of proof (part 2), the lawyers soon turned to devising principles of admissibility (part 3). I then turn to the question of causes (part 4). I

argue that the fact of the emergence of the doctrine is best understood, in functional terms, as a consequence of the transfer of a measure of control over procedural action from courts to parties. The specific form that the norms took, however is best explained, in intellectual-historical terms, as a consequence of influences from both Roman law and twelfth- and thirteenth-century rhetoric and logic. I sum up briefly in part 5.

2. THE NEW DOCTRINE OF POSITIONS

2.1 *Invocato Christi nomine*

The first two extensive treatments of the new law of interrogatories and positions date to around the turn of the thirteenth century: *Invocato Christi nomine*, the Tuscan *ordo iudiciorum* from the end of the twelfth century that we already encountered in chapter 2; and *Assiduis postulationibus*, an *ordo* composed less than twenty years later by the leading Bolognese canon lawyer Tancredus.[1] In both texts, we find efforts to fashion interrogatories and positions into a workable technique of obtaining proof, one which parties bearing the burden of proof could use to exploit their opponents.

We can begin with *Invocato Christi nomine*, from the end of the twelfth century in Tuscany. We saw in chapter 2 that by the 1190s courts and some arbitral panels in Pisa, Lucca, and Siena were requiring parties to answer their opponents' questions of fact under

[1] The original version of the text was worked on between 1214 and 1216 but completed only after the death of Pope Innocent III in July 1216. Johann Friedrich Ritter von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts von Gratian bis auf die Gegenwart*, vol. 1, *Die Geschichte der Quellen und Literatur von Gratian bis auf Papst Gregor IX.* (Stuttgart, 1875), 204. On the text, see Linda Fowler-Magerl, Ordo iudiciorum vel ordo iudiciarius*: Begriff und Literaturgattung* (Frankfurt am Main: Klostermann, 1984), 128–30. On Tancredus, see Andrea Bettetini, "Tancredi da Bologna," in *Dizionario biografico dei giuristi italiani (XII–XX secolo)*, ed. Italo Birocchi et al. (Bologna: Il mulino, 2013), 2:1930–31; Hermann Lange, *Römisches Recht im Mittelalter*, vol. 1, *Die Glossatoren* (Munich: C. H. Beck, 1997), 293–97.

oath and following joinder of issue. Bencivenne, author of *Invocato Christi nomine*, gives an account of this practice in his *ordo*. After joinder of issue, the party who bears the burden of proof has an opportunity to address questions to his or her opponent. The questions are supposed to be framed in yes-or-no terms, so that the opponent can ordinarily respond by saying either "I believe (that the assertion made in the question is true)" or "I do not believe (it)." If the opponent answers in the affirmative, that answer is ordinarily treated as proof of the matter asserted in the question. In many, but possibly not all cases, the parties swear an oath—the standard calumny oath—before the exchange of questions and answers.[2]

To fashion this new technique into a means of proof that could gain widespread acceptance in Roman-canon procedure, Bencivenne needed to give a convincing doctrinal account of the new institution, above all an account of the juridical nature and effect of a party's responses to questioning. (The term "position" was not yet familiar to Bencivenne; in keeping with the Tuscan practice that we observed in chapter 2, "interrogatory" is used throughout *Invocato Christi nomine* to designate the new means of proof.) This task of doctrinal definition consisted mainly in adapting existing areas of Roman law to explain the nature and effect of a party's responses to interrogatories.

A major source of Roman law that the author Bencivenne uses for this purpose is the existing Roman law of civil and criminal confessions. As we saw in chapter 1, classical and postclassical Roman law did not recognize the concept of a defendant's "confession" of only

[2] See generally Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 5, fasc. 1, *Der* ordo *"Invocato Christi nomine"* (Heidelberg: Winter, 1931), tit. 24 (*De interrogationibus et confessionibus factis post litem contestatam*), at 46–48; id., tit. 25 (*Si quis confiteatur iudici terreno vel deo*), at 49–51; id., tit. 26 (*De sacramento calumpnie vel de commissione et delegatione causarum*), at 51–52. Bencivenne states explicitly that he understood the calumny oath to encompass a duty of truthfulness. See id., tit. 25, at 49 ("Jurat enim, dicere vel respondere secundum opinionem sui animi […].").

one factual predicate of that claim. The dominant theory of *confessio* in the inherited Roman sources instead understood "confession" to mean a party's voluntary, binding admission of liability for the entire claim of his or her opponent. Accordingly, at the outset of the section of *Invocato Christi nomine* on party interrogatories, Bencivenne's first doctrinal move is to expand the existing Roman-law concept of confession to mean an admission not of an opponent's entire claim, but only of the one specific issue of fact raised in an interrogatory. Bencivenne accomplishes this doctrinal expansion silently, simply by asserting that the response of a party to an interrogatory is a "confession" within the meaning of that term in Roman law. Indeed, he takes care to stress that it is the legal sense, and not the spiritual meaning or some other notion of confession, that applies in this new area of the law, reiterating the *communis opinio* of the Roman lawyers that a party's in-court confession was ordinarily binding both on the party and on the judge:

> In the first place, therefore, it must be understood that in confessions [made] after joinder of issue there is no place for penitence. And from confessions there must be no retraction, since a person who has confessed before the magistrate is deemed to have been found liable, per Cod 7.59.1. For he is as it were condemned by his own judgment, as in Dig. 42.2.1. Furthermore, the saying of the Lord is read in the gospel: "Out of thine own mouth I will judge thee."[3]

Bencivenne reiterates this point later in *Invocato Christi nomine*, insisting "in summary" that a party who makes an in-court confession before a "terrestrial judge," rather than "to God,

[3] Id., tit. 24, at 46 ("Inprimis igitur sciendum, quod in confessionibus post litem contestatam factis non est locus penitentie, et ab illis recedi non debet, quoniam confessus in iure pro iudicato habetur, ut C. de confessis, l. un. [Cod. 7.59.1]; quodam enim modo sua sententia dampnatur, ut ff. eod. l. i [Dig. 42.2.1]. Item in evangelio a domino dictum legitur: 'Ex ore tuo te iudico' " [Luke 19:22].).

that is to say to a priest through God," must be deemed liable for the claim against him or her, "since that type of confession induces condemnation [i.e., a finding of liability]."[4]

Having adopted the general Roman-law principle of the binding effect of party confessions for the law of interrogatories, Bencivenne also incorporates the various qualifications of the principle that the legists had worked out by the end of the twelfth century. Some of these qualifications we saw in chapter 1. *Invocato Christi nomine* affirms, for example, that a confession made in answer to an interrogatory is ordinarily revocable if made in mistake of fact.[5] The text also distinguishes, following then-current scholarly treatments of the law of confessions, between confessions made in civil proceedings and confessions made in criminal proceedings. In Bencivenne's account, a voluntary civil confession is binding on the fact finder, whereas a confession made in response to an interrogatory in a criminal proceeding still leaves the fact finder free to continue investigating the factual issue that the defendant has confessed.[6]

In addition to borrowing from the Roman law of confessions, Bencivenne sets forth several rules to regulate the manner in which the responding party should reply to interrogatories, relying for authority on other areas of the *Corpus iuris*. At least one of these rules is ostensibly favorable to the respondent. Drawing on a fragment from the *Digest*, Bencivenne holds that the respondent may receive "time for deliberating" on the proper response to an interrogatory if he or she requests it and if the judge considers the request

[4] Id., tit. 25, at 49 ("In summa notandum est, quod confessus in iure iudici terreno habetur pro condempnato, quoniam ista talis confessio inducit condempnationem. Secus, si quis confiteatur deo, id est sacerdoti per deum, quoniam hec confessio inducit absolutionem.").
[5] Id., tit. 24, at 46–47.
[6] Id. at 47 ("In criminali vero causa confessionibus reorum pro exploratis facinoribus stari non oportet, ut ff. de questionibus, l. i, § divus [Dig. 48.18.1.17].").

appropriate.[7] Bencivenne's other rules, however, tend to constrain, rather than favor, the respondent. Borrowing another fragment from the *Digest*, the jurist holds that a respondent who "responds obscurely or perfunctorily" to an interrogatory is treated as if he or she had answered the question in the affirmative. This is because, he says, the respondent "must not leave the interrogating [party] uncertain."[8] Moreover, a party who refuses to respond altogether to an interrogatory is subject to the same sanction.[9] Here Bencivenne relies in part on a legal maxim of the Roman jurist Paul: "He who is silent does not necessarily admit, but it is nonetheless true that he does not deny."[10]

Perhaps most restrictive of all is Bencivenne's treatment of the permissible forms of answer that a respondent must use. The discussion in *Invocato Christi nomine* assumes that only three, and in some proceedings only two, types of answer to an interrogatory are permissible: a respondent must answer his or her opponent's interrogatory only with "I believe (or think) so" (*ita credo vel existimo*), "I do not believe so" (*non credo*), or in some circumstances "I am uncertain" (*dubito*). On this point Bencivenne reports that there was disagreement among the jurists. Some, he explained, held that a respondent could always reply that he or she was uncertain of the truth of the matter asserted in his or her opponent's interrogatory. Others held that a responding party was always required to answer either "I believe so" or "I do not believe so." These latter jurists reasoned that inasmuch as a party always had to swear in the calumny oath to answer questions in court "according to the belief

[7] Id. at 48 ("Item interrogatus habebit tempus ad deliberandum, si petierit, ut ff. de eod. l. qui interrogatur [Dig. 11.1.5]. Sed an semper dari debeat tempus ad deliberandum? Respondeo: dabitur, prout iudicanti videbitur.").
[8] See id. at 48 ("Item si obscure vel perfunctorie respondit, tenetur, ut ff. de interrogatoriis actionibus, l. de etate, § nichil [Dig. 11.1.11.7], quoniam non debet interrogantem incertum dimittere.").
[9] Id. ("Item qui ad interrogata non respondet, tenetur, ut ff. de interrogatoriis actionibus, l. de etate, § quod autem [Dig. 11.1.11.5].").
[10] Dig. 50.17.142 ("Qui tacet, non utique fatetur: sed tamen verum est eum non negare.").

of his own mind," the responding party should always be in a position to say what his subjective belief about the matter raised in an interrogatory was, and for this reason should be required to answer either "I believe so" or "I do not believe so." Bencivenne himself takes a middle position, which he says is that of one of his own law professors. A responding party should be compelled to answer as to what he or she believes or thinks when the matter at issue is something that he or she would reasonably be expected to know, such as the content of a contract to which the respondent was a party; but if the matter at issue is something with which the respondent would be expected to be unfamiliar, such as the content of a contract to which he or she is not a party, the answer "I am uncertain" would be acceptable.[11]

Viewed as a whole, the rules regulating party responses to interrogatories suggest that the core underlying policy of this new area of law was a pro-plaintiff one: to constrain the respondent to provide useful information to the party bearing the burden of proof. Bencivenne in fact makes this policy explicit. He explains that one of the purposes of applying the principle of the binding effect of a party confession to this area of law is to relieve the plaintiff from having to satisfy his or her burden of proof: "[A respondent who confesses in response to an interrogatory] is deemed to have been found liable also for this [purpose, namely,] so that the plaintiff is relieved from proof."[12]

2.2 *Assiduis postulationibus*

We can now turn to the second text to discuss the new area of law in depth, the *ordo Assiduis postulationibus*. The Bolognese canon lawyer Tancredus, writing *Assiduis postulationibus* a decade and a half after *Invocato Christi nomine* was completed, uses the

[11] See Wahrmund, *Quellen*, vol. 5.1, tit. 25, at 49–50.
[12] Id., tit. 24, at 47 ("Item et habetur pro condempnato et ad hoc, ut actor exoneretur probatione.").

newer term *positio*—the term we saw in chapter 2 in the Genoese, Milanese, and Savonese sources from the beginning of the thirteenth century—alongside the old *interrogatio* to designate the new approach to proof.[13] But in the essentials, the Bolognese jurist follows with minor deviations the main doctrinal lines laid out by his predecessor. Most important, Tancredus, like Bencivenne, treats a party's affirmative answer to an interrogatory as a confession within the meaning of that term in Roman law. Accordingly, Tancredus deems a respondent's confession to be binding against that party, citing the same Roman-law and scriptural texts as Bencivenne in support of the proposition, with added support from canon law.[14] He also subjects the principle of the binding effect of party confessions to the usual qualifications of Roman law, such as the rule that a confession must be voluntary. For the convenience of the reader, he summarizes these qualifications in a Latin dactylic hexameter couplet.[15]

Admittedly, not all of Tancredus's qualifications of the binding-effect principle were mentioned in Bencivenne's account. For example, Tancredus, but not Bencivenne, holds that the binding-effect principle of confessions does not apply to certain parties whom the law favors as a matter of policy. Accordingly, he explains, because public policy favors marriage, a party who has answered an interrogatory with a confession that a purported publicly

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[13] Friedrich Christian Bergmann, ed., "Tancredi Bononiensis Ordo iudiciarius," in *Pillii, Tancredi, Gratiae libri de iudiciorum ordine* (Göttingen, 1842), pt. 3, tit. 4 (*De interrogationibus faciendis in iure*), § 3, at 208 ("interrogationes […] seu positiones").
[14] See id., tit. 4 (*De confessis in iure*), § 1, at 211 ("Tantum valet confessio facta in iure, ut qui confitetur, pro convicto habeatur, ut [Cod. 7.59.1]; quodam enim modo sua sententia damnatur, ut [Dig. 42.2.1]; item in evangelio dictum a Domino legitur: 'ex ore tuo te iudico, serve nequam.' Contra se quis confiteri potest, et statur confessioni eius contra se, pro se vero minime, ut C. 14 q. 2 [c.] 1.").
[15] See id., § 2, at 211 ("Maior, sponte, sciens, contra se, ubi ius sit, et hostis. / Certum, nec natura, favor, lis iusve repugnet.").

contracted marriage never took place is entitled to retract the confession later.[16] But Tancredus's fundamental conception of this area of law in *Assiduis postulationibus* remains the same as that of Bencivenne in *Invocato Christi nomine*.

What *is* new in Tancredus's account is not the overall conceptual scheme, but the treatment of several new legal problems that had arisen in the decade and a half between *Invocato Christi nomine* and *Assiduis postulationibus*. It is here that Bencivenne's policy favoring interrogating parties over responding parties is most clearly confirmed and bolstered.

Some of the new principles that Tancredus proposes do not obviously favor either plaintiffs or defendants, but instead simply address problems that reflect the increasing complexity of this area of procedure. One important problem, which Bencivenne had not directly addressed, was that of allocating responsibility for formulating and posing interrogatories or positions among the different participants in a trial. Tancredus's discussion of the problem suggests that by the second decade of the thirteenth century the exchange of interrogatories or positions was becoming both more technical and more combative and adversarial. Increased technicality is suggested by his observation that although the parties themselves are responsible for putting forward interrogatories or positions, in practice parties' lawyers formulate the questions or propositions. He explains that this practice arose out of court "custom, which is the greatest interpreter of laws."[17] Increased combativeness is suggested by Tancredus's comment that the responsibility for actually posing the

[16] See id. at 213 (" 'Favor' ideo subiungitur […. F]avor matrimonii facit, quia nulla confessio facta contra matrimonium publice contractum ei praeiudicare potest […].").
[17] Id., tit. 3 (*De interrogationibus faciendis in iure*), § 2, at 208 ("Quis formare debet interrogationes, quaeritur. Et quidem consuetudo habet, quae est maxima legum interpres, ut advocati partium forment interrogationes suas seu positiones […].").

interrogatories or positions to the opposing party lies not with the proposing party or his or her lawyer, but with the judge or one of the officials assisting the judge, such as a notary. Tancredus hints that this practice was adopted because direct questioning from parties, although attested in the sources and supported to some extent by Roman law,[18] had come to be seen as no longer legitimate: "no one," he explains, "is required to respond to the interrogatory of an adversary."[19] Both technicality and combativeness, meanwhile, are implied by Tancredus's recommendation that all interrogatories or positions be composed in writing using standard language. This is "lest contention should arise between the parties as to whether one was written differently from how it was put forward"—here Tancredus is perhaps imagining a situation in which the judge is confused by an unusually worded question and fails to read aloud exactly what was proposed in writing—and "also for another reason, so that he who is questioned is certain, and understands what he has to reply to."[20]

Such discussion of the problem of allocation of tasks among trial participants shows the growing sophistication of this new means of proof, but it does not imply any policy favoring or disfavoring one party or another. Other new norms that Tancredus discusses, however, operate to constrain one or the other party more closely during the exchange of interrogatories or positions and responses. Admittedly, these norms by no means all, or even mostly, directly favor the party bearing the burden of proof. Two new norms in particular constrain the interrogant or proponent, not the respondent. For one, Tancredus requires the party putting forward interrogatories or positions to formulate his or her questions or

[18] See Dig. 11.1.9.1 ("Interrogatum non solum a praetore accipere debemus, sed et ab adversario.").
[19] Bergmann, "Tancredi Bononiensis Ordo," pt. 3, tit. 3, § 1, at 207 ("[N]on tene[]tur aliquis ad interrogationem adversarii respondere […].").
[20] Id., § 2, at 208 ("Et haec fiunt ad advocatis proponentis, ne oriatur contentio inter partes, quod aliter sit scripta, quam fuerit proposita; item alia ratione, ut certus sit, qui interrogatur, et super quo debeat respondere, cognoscat.").

propositions solely in affirmative terms: "How must interrogatories or positions be formulated? it is asked. I respond: in affirmative and not negative words, since he who denies, says nothing, and there are no trials about negations […]."[21] In other words, an interrogatory or position consisting solely of an assertion that someone did *not* do something, or that something did *not* happen, cannot be admitted. Tancredus also constrains the party bearing the burden of proof by requiring him or her to swear to his or her belief in the truth of the matter being asserted in every interrogatory or position before it is put to the respondent.[22]

Nonetheless, it seems likely that Tancredus's resolution of additional problems of practical implementation conduced primarily to the benefit of proponents over respondents, as further doctrinal elaboration made interrogatories and positions into a means of proof that plaintiffs could more readily deploy in trials. This likelihood is suggested in part by the norms that Tancredus sets forth to constrain respondents. These norms include rules similar to those already laid out in *Invocato Christi nomine*: rules prohibiting the respondent from answering "obscurely" or "not respond[ing] to the questions" and a rule holding a respondent who refuses to answer to be in contumacy, and thus potentially subject to a default judgment.[23] They also include new restrictions. Tancredus, unlike Bencivenne, insists that a respondent must give a yes or no (*confiteatur, vel neget*) answer to every interrogatory or position. An answer along the lines of, "I am uncertain," is not allowed. He also insists that

[21] Id., § 3, at 209 ("Qualiter sunt formandae interrogationes vel positiones, quaeritur. Respondeo, verbis affirmativis et non negativis, quoniam qui negat, nihil dicit, et negationum nullae sunt causae […].").
[22] Id., § 2, at 208 ("Facta positione et scripta iudex per sacramentum interrogare debet proponentem, si credit ita verum esse, sicut proponit.").
[23] Id., § 4, at 209–10 ("[S]i obscure respondet vel non respondet ad interrogata, perinde est ac si non responderet […]. Si vero interrogatus nullo modo respondeat, dicunt quidam eum perinde teneri ac si confiteretur. […] Verum quidem est, quod nec fatetur, neque negat […] et ideo dico illum non condemnandum tamquam confessum, sed tamquam contumacem ad arbitrium iudicis puniendum."). Note that here Tancredus draws a different conclusion from that of Bencivenne, for whom silence was tantamount to an affirmative answer.

although a responding party may be granted extra time to consider his or her answer, Tancredus prohibits respondents from consulting with their lawyers while they are preparing to answer. The respondent must answer alone, without "coaching" from counsel.[24]

The likelihood that the jurists' doctrinal elaboration worked primarily to the benefit of proponents, not respondents, is suggested in part too by at least one norm that applies only to interrogating or proposing parties. This is Tancredus's norm prohibiting the party bearing the burden of proof and his or her lawyer from including two or more factual elements in a single interrogatory or position. For example, Tancredus explains, if I want to prove that you have eaten today, and I say, "You ate today in church," my *positio* is faulty, because the purported fact of eating and the purported fact of being in church are separable, and thus should be given in two successive positions. Otherwise, if you did in fact eat earlier today but not while inside a church, you are entitled to answer in the negative, thereby depriving me of the proof that I wanted.[25] Although in principle a restriction on interrogants and proponents, this principle also benefits them, since it ensures that parties put forward well-formed interrogatories and positions that are more likely to yield proof from respondents.

The stress, even danger, that the proponent's use of interrogatories or positions imposed on the respondent is most vividly illustrated, however, by the advice Tancredus

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[24] See id. at 209–10 ("Hoc modo respondere debet iudici is, qui interrogatur, ut confiteatur, vel neget […]. Praeterea nota, quod licet interrogationes de consilio advocatorum sint faciendae et formandae, responsiones tamen a partibus ipsis sine advocatorum consilio fieri debent; quoniam factum ipsum per principales personas, et non per advocatos proponi debet […]. Item nota, quod, si interrogatus dubitat super eo, de quo interrogatur, dandae sunt ei dilationes ad deliberandum, ut Dig. [11.1.5]. Sed si se dicat ignorare veritatem rei […] compellendus est praecise respondere ad interrogata, quia non tenetur dicere nisi, credat vel non credat esse, quod quaeritur.").

[25] See id., § 3, at 209 ("Et nota, quoniam advocatus non debet duas positiones sub una interrogatione formare, ne, cum altera pars sit falsa, licet sit altera vera, is, qui interrogatur, utramque neget, quod potest de iure facere, per regulam, quae dicit: cuius aliqua particularis est falsa, eius universalis est similiter falsa.").

gives to avoid accidental repetition of the same interrogatory or position twice and the resulting possibility of perjury and eventual eternal damnation. Once an interrogatory or position has been put forward to the responding party and the respondent has answered, the judge should be sure to

> have [the respondent's] response written down, lest he be questioned on the same topic again. For if the judge questions him again on the same topic, unless something new has emerged, say because earlier writings were lost, [the judge] does him an injury and burdens him and makes him undergo [a risk of] a two-headed perjury, as it were, or incur disgrace among the common people, because if [the respondent] believed one thing then and [believes] another thing now, he incurs perjury or disgrace on the basis of his response […].[26]

Tancredus's understanding of perjury is harsh and technical. If in the absence of new information or special circumstances the respondent gives two contradictory answers to the same, repeated interrogatory or position, he or she has perjured himself and accordingly, in the thinking of the time, runs a risk of possibly irreparable danger to his or her soul. One readily understands from this passage that such conditions of mortal risk to the safety of the soul must have exerted special psychological pressure on respondents in particular.

3. THE RISE OF NORMS OF ADMISSIBILITY

3.1 *Cum frequens et cotidianus*

So far I have been giving an account of the turn-of-the-century doctrine of interrogatories and positions developed in Bencivenne's *Invocato Christi nomine* and Tancredus's *Assiduis postulationibus* that emerged in response to the new approach to the use

[26] Id., § 2, at 208 ("[F]acit scribi eius responsionem, ne super eodem articulo iterum interrogetur; quoniam, si iudex iterum eum super eodem articulo interroget, nisi novum quid emerserit, puta quia perdita sunt scripta priora, iniuriam facit ei et gravat ipsum et quasi anceps periurium facit eum subire vel infamiam vulgi incurrere; quia, si aliter credebat tunc et aliter nunc, ex responsione incurrit periurium vel infamiam […].").

of parties as sources of proof in late twelfth-century practice. I have been arguing that these two jurists' main task was definitional: to define interrogatories and positions in doctrinal terms that would be comprehensible to lawyers conversant in Roman law. These authors also sought to resolve the problems of practical implementation that had arisen in the first decades of using the new means of proof.

In the late 1230s and early 1240s, however, the pressure on respondents appears to have elicited a further, distinct doctrinal response from the lawyers. In writings from the period between 1234 and about 1245[27] of two thirteenth-century lawyers—the prominent legists Roffredus Beneventanus and (possibly) Martinus de Fano—we find concerted and systematic efforts to formulate principles of admissibility that would protect responding parties from having to answer certain categories of interrogatory or position.

These efforts are especially concerted in the monograph treatise *Cum frequens et cotidianus* of Roffredus Beneventanus. Among Roman lawyers of the first decades of the thirteenth century, Roffredus, who had experience both as a teacher in Bologna and Arezzo and as a practitioner at among other places the Roman Curia, took particular interest in the practical aspects of lawyering and composed several works touching on procedure, including *Cum frequens et cotidianus*.[28] *Cum frequens et cotidianus* itself is divided into eight sections,

[27] On this date range, see the discussion of primary sources in part 2 of the introduction to this dissertation.

[28] Roffredus's interests and experiences are reflected in the titles of some of his writings other than *Cum frequens et cotidianus*, including *De actionibus* ("On Actions") or *Summa de actionibus* ("Summa on Actions"), a lost work on the Roman forms of actions; *Libelli de iure canonico* ("Books on Canon Law"), a précis of canon law written for use by Roman lawyers and completed in the mid-1230s; and *De libellis et ordine iudiciorum* ("On Pleadings and the Order of Proceedings"), composed in the 1220s and 1230s and probably left incomplete, which combines a procedural manual of the *ordo iudiciorum* genre with a long treatise on the formulation of pleadings for different Roman forms of action. On Roffredus's biography and œuvre, see Ennio Cortese, "Roffredo Epifani (*Epifanius*, *Epifanides*) da Benevento)," in

answering the questions: (1) what a position is (*quid sit posicio*); (2) where the term "position" comes from (*unde traxit originem hoc uocabulum*); (3) what the purpose of positions is (*ad quid fiant posiciones*); (4) how positions differ from interrogatories (*in quo differant ab interrogacionibus*); (5) which party can make positions (*ex qua parte fiant posiciones*); (6) when during the proceeding positions should be made (*quando fieri debeant*); (7) what the legal effect of making a position is (*quis sit effectus*); and (8) which positions are inadmissible in a proceeding (*quae sint attendenda circa posicionum reprobaciones, et de cautelis circa posiciones habendis*).[29]

The first seven of these sections largely confirm and refine the doctrine already found in *Invocato Christi nomine* and *Assiduis postulationibus*. In keeping with the more abstract and theoretical character of the treatise genre as compared to procedural manuals, Roffredus devotes several sections to describing the "substance" and origin of the doctrine.

Birocchi et al., *Dizionario*, 2:1712–15; see also Lange, *Römisches Recht*, 1:314–23; Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. 5, *Das dreizehnte Jahrhundert*, 2nd ed. (Heidelberg, 1850), 184–217. On the history of the text, see part 2 of the introduction to this dissertation.

[29] Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fol. 103va. Roffredus's organizational scheme follows the order of subject matter that would have been familiar to thirteenth-century readers from their schooling in the trivium. For a parallel to the order *what* (what a position is), *why* (where positions come from, what the purpose of positions is), *how* (which party in the proceeding can make positions), *when* (when during the proceeding positions are made), compare "An. Manl. Sev. Boetii De differentiis topicis libri quatuor," *PL* 64:1212C ("Sed ut rerum ordo clarius colliquescat, de circumstantiis arbitror esse dicendum. Circumstantiae sunt quae convenientes substantiam quaestionis efficiunt. Nisi enim sit qui fecerit, et *quid* fecerit, *causaque cur* fecerit, locus, *tempus*que quo fecerit, *modus* etiam facultatesque si desunt, causa non stabit" (emphasis added).). Compare also the order of categories presented in Boethius's Latin translation of the *Categories* of Aristotle. The first question of what a position is corresponds to the Aristotelian category of *substantia* (what a thing is); the treatise addresses this problem before considering when positions are made (corresponding to the category of *ubi*, "when") and what positions' legal effect is (corresponding to the category of *facere*, "doing"). Cf. Lorenzo Minio-Paluello, ed., "Translatio Boethii: Liber Aristotelis de decem praedicamentis," in *Categoriae vel Praedicamenta*, vol. 1, pts. 1–5 of *Aristoteles Latinus* (Bruges: Desclée de Brouwer, 1961), 6, 7–13, 30 (discussing the order of categories, *substantia*, and *facere* respectively).

Thus in the first section he gives a definition of *positio* as "a statement put forward in place of an interrogatory," explaining that by the time he was writing, parties generally phrased their factual questions for one another as assertions (positions) rather than as questions (interrogatories).[30]

In the third section, Roffredus confirms what Bencivenne has already told us, namely that the core policy of the law of interrogatories or positions is to facilitate relief from the *onus probationis* for parties bearing the burden of persuasion: "Positions […] are made in order that parties may be relieved from the burden of proof through the confession of an adversary."[31] He adds that it is "for this (sc. purpose)" also that parties are required to swear the calumny oath beforehand; by "this" he most likely means that the oath is intended to ensure that respondents provide usable proof for the parties bearing the burden of proof.[32]

Roffredus also essentially confirms Bencivenne's and Tancredus's account of the juridical nature and effect of a party's response to a position. Like his two predecessors, he holds that if a respondent admits a position of his or her opponent, the admission is the equivalent of a binding party confession: "The effect of positions is that if the party against whom a position is made confesses the matter asserted in the position, that party is deemed to have confessed."[33]

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[30] Bologna, Biblioteca comunale dell'Archiginnasio, MS B 2794–2795, fol. 103va ("Posicio est dictum loco interrogacionis positum, et quidem satis uidetur conuenienter hoc modo describi. nam olim quod ponebatur sub forma interrogacionis, hodie de plano ponitur […].").
[31] Id. ("Fiunt autem posiciones ut partes releuentur ab honere probacionis per confessionem aduersarii […].").
[32] Id. ("ad hoc inuentum est ius iurandum de calumpnia per partem").
[33] Id. ("Effectus posicionum est quod si ille contra quem ponitur confitetur quod positum est, pro confesso habetur […].."). Roffredus adds a refinement to earlier doctrine on this point, however, by drawing a sharper conceptual distinction between two senses of the word *confessio*. The medieval lawyers needed to have a way of distinguishing between a confession of the opposing party's *claim*, during joinder of issue, and a confession of the

In the last section of *Cum frequens et cotidianus*, however, Roffredus moves away from the topics that his predecessors had already addressed in depth and confronts a question that had not before been treated systematically: under what circumstances is a position inadmissible and the responding party therefore not required to reply? We saw earlier that Tancredus proscribed redundant interrogatories and positions, with Tancredus explaining that repetition of a position could cause the responding party to commit perjury by contradicting him- or herself. As we saw, Tancredus also banned any interrogatory or position that included multiple factual elements as well as any "negative" interrogatory or position—that is, one asserting that something did *not* happen. But Roffredus deals with the question of admissibility much more comprehensively and systematically, distinguishing by his count fourteen categories of position that he holds to be inadmissible.

Three of Roffredus's fourteen inadmissible categories involve problems already raised by Tancredus.

Like his predecessor, Roffredus bans redundant, or what he calls "superfluous," positions. A superfluous position, in his definition, is one that is the same as a position that has been already confessed or denied, or one that is directly contrary to a position that the

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opposing party's *allegation of fact*, during the exchange of positions and responses. Roffredus proposes several tests to distinguish between these two senses. One test asks whether the confessing party had had an *animus contestandi*, that is, the subjective intent to join issue; if so, the confession in question was not a response to a position. Another test takes an objective perspective, asking whether the party to whom the confessing party was responding had stated merely a "bare fact" (*nudum factum*) or a fact that was mingled with a legal conclusion (*factum et ius*). If the former, a position had been made; if the latter, the parties had joined issue. See id., fol. 103vb.

respondent has already confessed or denied. The responding party should not answer such a position, and any such position should be "rejected [from] the files" of the case.[34]

Like Tancredus too, Roffredus declares positions containing multiple factual elements to be inadmissible. Roffredus calls this type a "multipart" (*multiplex*) position: "that is," he says, a position that "contains several positions or several assertions." He gives as examples the positions, "Titius posits that Seius was the son of Maevius and gave [Maevius] a hundred" units of money, and "Seius, son of Maevius, owes [the plaintiff] a hundred." Each of these examples is malformed, he says, because it embraces two propositions, "of which one can be true, the other false." He suggests that in such cases the responding party can choose to warn his or her adversary to be more specific: "The [respondent] could say, 'Brother, explain your assertions, or else I [will] not respond,' or he could explain without harm, 'This is true, that is false' […]." If the respondent "wishes to respond more cautiously," the jurist recommends that he or she respond with a flat denial, saying, "what you posit is not true." In that case, Roffredus explains, the denial is understood to apply to the "association" of the two propositions rather than to each proposition individually, since one of them could well be true.[35]

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[34] Id., fol. 103vb ("Primo consideratum utrum posicio sit superflua, quod contingit siue eadem sit cum iam confessa, siue eadem sit cum iam negata, siue contraria iam confessa, siue contraria iam negata. in omnibus istis casibus dicendum est non esse et respondendum, quia iam responsum est superfluitas que reprobatur in actis […].").

[35] Id., fol. 104ra ("Undecimo attendendum est an posicio sit multiplex, idest contineat multas posiciones uel(?) multa dicta, puta sicut ponit Ticius Seium fuisse filium Meuii, et ei dedit C, uel ita ponit Ticius quod Seius filius Meuii debet ei C. duo enim comprobant(?) utraque illarum posicionum, quorum unum potest esse uerum, alterum falsum simul et semel. poterit dicere aduersarius, frater explica dicta tua, alias non respondeo, uel impune(?) poterit explicare, hoc uerum, illud falsum […]. uel si cautius respondere uelit, poterit preferre negacionem et dicere, non uerum quod ponis, nec per hec uidebitur utramque negare, set copulam, uel associacionem.")

Roffredus similarly follows Tancredus in prohibiting "negative" positions.[36] The purpose of positions, he repeats, is to relieve the party bearing the burden of proof. Yet the *Code* itself states that "in the nature of things a person who denies a fact has no proof," suggesting that a negative assertion cannot be proved in any case.[37] Moreover, Roffredus notes, Pope Innocent III observed in a decretal that "in the nature of things" (*per rerum naturam*) there could be "no direct proof" (*nulla est directa probatio*) of the claim of one party of a negative, namely, that he had never been cited to appear in court.[38] For these reasons, the jurist concludes, a party is not permitted to put forward a position that asserted a negative.[39]

In addition to these three categories shared with Tancredus, Roffredus discuss another eleven (by his own count) types of position that he holds to be inadmissible. Although Roffredus himself provides no further grouping of these categories, most of them can be

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[36] Here a difficulty is posed by what I believe is a later textual interpolation. The supposed interpolation follows the 1245 papal decretal *Statuimus* (VI 2.9.1) of Innocent IV in allowing negative positions in some circumstances, a reversal of prior law. See id. ("[H]odie uero bene recipiuntur posiciones negatiue, si iudex uiderit per predictam decretalem nouam, ex. de confessis statuimus [VI 2.9.1]."). Ugo Nicolini argued convincingly that an equivalent interpolation is present in the text of *Positiones succedunt in locum probationum* that is transmitted in the same manuscript from around the turn of the fourteenth century. See Ugo Nicolini, ed., *Trattati "De positionibus" attribuiti a Martino da Fano: In un codice sconosciuto dell'Archiginnasio di Bologna (B 2794, 2795)* (Milan: Vita e pensiero, 1935), 57. My discussion of negative positions here thus presupposes the existence of an earlier *Textstufe* from which the decretal of Innocent IV is absent.

[37] Cod. 4.19.23 ("Actor quod adseverat probare se non posse profitendo reum necessitate monstrandi contrarium non adstringit, cum per rerum naturam factum negantis probatio nulla sit.").

[38] X 1.6.23.

[39] Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fols. 103vb–104ra ("Octauo occurrit uidendum, an sit negatiua posicio. nam si sit negatiua, impune non respondetur quod fit per accusam, ut diximus: posicionum usus inuentus sit ad releuandum ab honere probacionis, scilicet per confessionem aduersarii, ut ff. de interrogatoriis actionibus l. i et ii, iii, iiii [Dig. 11.1.1–.4], nec tenetur quis negatiuam probare, cum per rerum naturam negantis factum etc., ut C. de probacionibus l. actor [Cod. 4.19.23], ex. de electione c. bone i [X 1.6.23], unde et apparet negatiuam non esse ponendam.").

gathered under two, partly overlapping headings: those that are excluded because they prejudice the respondent; and those that are excluded because of their low probative value. A possible outlier category is that of positions that draw conclusions of law. A position that makes an assertion of law, rather than one of fact, is inadmissible, Roffredus implies, for reasons of judicial administration: issues of law do not require proof, and they are in any case for the judge, not the parties, to decide.[40]

Prejudice. One group of inadmissible categories covers positions that, if answered, could cause the respondent to perjure him- or herself or risk some other unfair prejudice. Roffredus in fact defines two types of position that are inadmissible because of a danger of perjury.

One is any position "that would reveal the perjury of the respondent" (*que detegat periurium respondentis*). To give an example of this sort of position, the jurist imagines a complicated case in which a defendant had previously been defendant in an earlier proceeding brought by the creditor of a *peculium*, the Roman-law term for a fund of assets held by a dependent of the defendant. Suppose, Roffredus says, the defendant swore in that earlier proceeding that the *peculium* in question had no assets; however, it was later determined that in fact (perhaps unbeknownst to the defendant) the *peculium* did contain an asset at the time the defendant swore his oath. Suppose further that that defendant is now asked in the present proceeding to answer a position asserting that there *was* property in the *peculium* at the time he swore the earlier oath. That position, Roffredus holds, is inadmissible "on account of the contradiction that follows" (*propter inconveniens quod sequitur*), because

[40] See id., fol. 104rb ("Terciadecima consideratur circa id, attenditur ne posicio [fiat] iuris fiat, set facti. […] iura enim in se probata sunt, et de hiis constare debet iudici […].").

if the defendant confesses the truth, he will be deemed to have perjured himself in the earlier proceeding when he swore (incorrectly) that the *peculium* contained no assets.

Slightly different is the category of position that does not "reveal" perjury, but "lead[s]" the respondent "to perjury." This can happen, Roffredus explains, when a respondent is induced to answer a position by saying he or she "thinks" or "knows" that the assertion is true or false when in reality he or she is "ambivalent or doubtful" as to the truth.[41] The jurist gives as an example the hypothetical interrogatory or position, "The king of England is in the church" (i.e., not currently excommunicated). "Clearly," he explains, there is "no reason" for the respondent to believe that the statement is either true or false, since he or she has no way of knowing the truth.[42] Although Roffredus's reasoning on this point is not explicit, he seems to think that the judge should not admit such a position because he should recognize that the respondent cannot answer knowledgeably. Similarly, Roffredus implies that the judge may choose not to admit, or to allow a delayed response for, any position that could cause "prejudice to the respondent" if answered in too much "haste." At a minimum, the respondent in such cases will not "be compelled to respond immediately," the jurist says.[43]

A further type of position that can be excluded to unfair prevent prejudice to the respondent is the captious position. This is any position that "through a sort of craftiness and

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[41] Id. ("Duodecima consideracio occurrit ne quis respondeat ad posicionem ut per responsionem deducatur ad periurium […] quod contingit cum aliquis anceps uel dubius tanquam certus respondet asserens uerum esse quod falsum, uel econtra.").
[42] Id., fol. 104ra–rb ("[Q]uid enim si interrogem(?) an rex Anglie in ecclesia sit, an extra. certe nec hoc nec illud puto, quia eciam nulla racio me inducit ad hoc pocius credendum quam illud. unde audacter possum dicere, non puto; preferam negacionem.").
[43] Id., fol. 103vb ("Quinto inspiciendum est utrum per responsionem ad posicionem quasi ex quadam precipitacione preiudicium fieret respondenti … tunc non cogitur statim respondere […].").

subtle disputation" aims to confuse the respondent into conceding facts that contradict what he or she has already affirmed or denied. Roffredus gives the example of a party who first submits the position, "Lucius Titius was Seius's agent." When the respondent has denied this position, the opposing party then proceeds to submit a series of positions that aim to show a principal-agent relationship between Lucius Titius and Seius, but by less direct means: "Lucius Titius raised vines for Seius," "Lucius Titius sold vines belonging to the same," and so forth, hoping that the respondent will be confused and answer one of the positions in the affirmative.[44] Such tactics are forbidden according to Roffredus.

In any case, even when a position is otherwise admissible, Roffredus suggests, the judge may opt not to admit it, not to compel the respondent to answer, or not to bind the respondent to his or her answer if the responding party is protected by a public policy. Roffredus gives an example drawn from the *Digest*: under Roman law, a son could renounce an inheritance from his decedent father. If he did so, and then was asked in court whether he was his father's heir (say, by a creditor of his father), he was free not to respond, and if he said nothing, his failure to answer would not be interpreted against him. In such a case a public policy protects the respondent from having to answer his or her opponent's position. Even a party who is uncertain of whether he or she holds a particular legal entitlement may

[44] Id., fol. 104rb ("Quartadecima consideracio est super cauillacionibus, hoc est de illis, que per calliditatem quandam et subtilem discussionem vel interrogacionem ad concedendum appositum iam negato uel †commisso per eciam dudum ex gracia posui†, sic pono quod Lucius Ticius fuit procurator Seii. Resp. aduersarius nequaquam. deinde sic pono, eciam pono quod Lucius Ticius fecit cali (*recte* coli) uineas Seii. pono quod uendidit uineas eiusdem Seii. pono quod culturam uinearum suarum administrando peregit. pono quod Seius mandauit ei quod ea que suprascripta sunt, uel aliqua ex eis faceret dictus Lucius Ticius. hec si concedantur, manifeste includunt contrarium eius quod negatum est.").

be excused from responding to a position, Roffredus says, if a response could prejudice his or her rights.[45]

Low Probative Value. Last are several types of position that Roffredus holds to be inadmissible on account of their low probative value. The main category is that of "irrelevant" (*impertinens*) positions. A position is irrelevant, according to Roffredus, if proof of the matter asserted in the position "would be of no benefit."[46] But Roffredus appears to suggest that a position that is of questionable, or very low probative value for the proponent can also be excluded. The judge may, he says, conduct a "summary hearing" to determine "whether it is really in the interest of the person who is positing [the position] that an answer should be given."[47] Another category that can perhaps be defined as an "irrelevant" position is one that is inadmissible because it is properly directed against a third party, not the respondent. The jurist provides no further explanation of what he means, but by way of example he refers to a passage of the *Digest* in which it is observed that in Roman law only a

[45] See id., fol. 103vb ("Septimo notandum est casus in quos quis cogitur respondere, puta filius qui se ab hereditate paterna abstraxit. trahitur quasi heres ad iudicium, et aduersarius eius sic dicat, pono illum esse heredem. non cogitur respondere, ff. de interrogatoriis actionibus l. si filius. pretor enim eum tuetur, ut ibidem dicitur. […] Item non est cogendus respondere ubi dubius de iure suo et ex responsione sua potest ei preiudicari […].").
[46] Id. ("Secundo considerandum est utrum quod ponitur sit impertinens ad negocium, quod si probatum esset, non prodesset, de (quo) possunt eleganter poni exempla, ff. de interrogatoriis actionibus l. de etate § de pecunia [Dig. 11.1.9.8?], C. de probacionibus l. ad probationem [Cod. 4.19.21], et C. ne uxor pro marito l. i [Cod. 4.12.1], C. si mancipium ita fuerit alienatum l. i [Cod. 4.57.1], et C. (de prediis uel aliis rebus minorum) l. siquidem [Cod. 5.71.11], et ff. ad l. Falcidiam l. in quantitate § ultimo in fine [Dig. 35.2.73.5], et ex. de officio et potestate iudicis delegati c. cum contingat in fine capituli [X 1.29.36], et ex. de excepcionibus c. dilecti filii [X 2.25.8].").
[47] Id. ("Sexto considerandum est utrum ualde intersit eius qui ponit quod respondeatur, in qua re habet locum summaria cognitio, ut ff. de interrogatoriis actionibus l. si sine § illud [Dig. 11.1.9.6].").

person who is purportedly an heir to an inheritance can be compelled to answer the question of whether he is in fact the heir.[48]

In addition to categories of irrelevant position, Roffredus excludes two categories of positions that have a low probative value because they are too vague. One such proscribed category is the "obscure" position. Both obscure positions and obscure responses, Roffredus explains, are prohibited.[49] Also prohibited are positions that are too general, because they are phrased in categorical terms (*in genere generalissimo*). "Suppose," Roffredus says, "someone posits that 'property' in general is owed to him, or I posit thus: that Titius owes me 'something'; no response is owed" to such overly general positions. This is because, he explains, such positions are "utterly useless" as proof. If I posit that you owe me "property," you could confess the position and then pay me back nothing more than "a straw," the jurist scoffs.[50]

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[48] See id. ("Quarto an id ponatur adtendendum est ad quod non ipse contra quem fit posicio, set alius respondere tenetur, ut ff. de interrogatoriis actionibus l. si sine § alius [Dig. 11.1.9.3].").

[49] To give examples of obscurity, Roffredus cites two imperial rescripts from the *Code*, Cod. 2.4.15 and Cod. 6.26.8, and two fragments from the *Digest*; these are, however, not especially illuminating. In the first rescript, the emperor expresses uncertainty about the type of legal transaction that was at issue in the case being referred to him; in the second, the emperors criticize the petitioner for failing to describe the facts of her case with sufficient clarity. The fragments from the *Digest* restate the requirement that a party bringing an action for *iniuria* claim a definite sum of damages. See Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fol. 103vb ("Tercio consideratum, an sit obscura posicio. nam si sit obscura, non admittitur, ad quod est C. de transactionibus l. ut responsum [Cod. 2.4.15] et C. de inpuberum et aliis substitucionibus l. precibus [Cod. 6.26.8], ff. de iniuriis l. pretor in pr. et § quod autem [Dig. 47.10.7 pr., .4], per quas leges evidenter possunt poni exempla […]. sic clare et non obscure quis debet respondere […].").

[50] Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fol. 104ra ("Nono notandum est quod si posicio fiat in genere generalissimo refutanda sit, ut pote inutilis et nulla(?), uerbi gracia, ponit aliquis sibi deberi fundum in genere, uel sic pono quod Ticius debet michi aliquid, non debet responderi, quia prorsus est inutilis propter inutilitatem solucionis. prestando enim festucam uel fundum … digiti debitor liberatur, et ideo eciam [sc. non] oportet circa tales posiciones uel probaciones laborare […].").

3.2 *De libellis et ordine iudiciorum*

I suggested just now that a significant category of inadmissible position in Roffredus's text is the category of the "irrelevant" (*impertinens*) position. Unfortunately, the jurist gives little indication of what he means by "irrelevant" (*impertinens*) in *Cum frequens et cotidianus*. Several passages of the *Digest*, the *Code*, and the *Liber Extra* are cited in the Bologna manuscript of *Cum frequens et cotidianus* that we have been using as the basis for discussion.[51] But these citations, if indeed they are all original to the text and were not added later, offer little insight into the author's understanding of relevance.

Another work of Roffredus dealing with the law of procedure, however—his *De libellis et ordine iudiciorum*—is somewhat more illuminating. This work, begun in the 1210s and unfinished at Roffredus's death in the 1240s, consists in part of a procedural manual (*ordo iudiciorum*) and in part of a compendium of sample pleadings (*libelli*, "libels") for use in different forms of action.[52] For each form of action and sample pleading, Roffredus begins by describing the purpose for which that action is used and the requirements for obtaining a remedy. He then sets forth positions stating the minimum factual elements that the plaintiff must establish to prove his or her case.

An example of Roffredus's approach to formulating positions in *De libellis et ordine iudiciorum* can be found in the jurist's treatment of the Roman *actio negotiorum gestorum* (roughly, "action for unauthorized agency"). In Roman law as the glossators understood it, a guardian or other fiduciary for a person could bring an *actio negotiorum gestorum* to recover damages from a defendant who had managed the affairs of that person without the fiduciary's consent and to the person's detriment. Roffredus begins by stating the elements of the action:

[51] Dig. 11.1.9.8(?), 35.2.73.5; Cod. 4.12.1, 4.19.22, 4.57.1, 5.71.11; X 1.29.36, 2.25.8.
[52] See Cortese, "Roffredo Epifani," 1712–13.

"First, that the plaintiff was a tutor, curator, executor, heir at law, or testamentary guardian. Second, that the defendant managed the affairs of the ward, adult under tutorship or curatorship, or the like. Third, that the defendant acted in knowledge of that tutorship, curatorship, or the like, as in Dig. 3.5.5."[53] He then provides a set of sample positions for the plaintiff that merely restate the bare elements of the action in propositional form:

> I say that so and so is my ward or an adult over whom I hold a curatorship.
>
> Further, I say that you managed the affairs of said ward or minor.
>
> Further, I say that you managed the affairs that you managed in such a way that I could not be called into court to account for the tutorship or curatorship.[54]

For Roffredus, properly formulated positions essentially restated the elements of an action in the form of propositions. Rather than training the plaintiff to build a case on the basis of numerous small circumstantial facts, Roffredus directs the plaintiff simply to break down the form of action into its constituent elements and ask the defendant to concede each of the elements in turn. Each position asserts one of the ultimate facts in issue.

Not all of the sample positions that Roffredus offers in the *De libellis et ordine iudiciorum* are quite so perfunctory. In discussing some forms of action the jurist does allow for the possibility that the defendant will prove unwilling to concede an element of the action

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[53] Mario Viora, ed., *Roffredi Beneventani Libelli iuris civilis*, Corpus glossatorum juris civilis 6.1 (Avignon, 1500; repr., Turin: Bottega d'Erasmo, 1968), pt. 1, rub. *de negotiorum gestione*, at 39b = fol. 20rb ("In primis quod ille fuerit tutor vel curator vel testamentarius vel legitimus vel dativus. Secundum quod gesserim negocia pupilli vel adulti illius tut. vel cur. Tertium quod contemplatione illius gesserim, s. tu vel cu. ut in predicta l. si pupilli [Dig. 3.5.5].").

[54] Id. ("Unde in hac actione actor facit tales positiones. Positio actoris: Ego dico quod talis est pupillus meus vel adultus cuius curam gero. Item dico quod tu gessisti negocia ipsius pupilli vel minoris. Item dico quod illa negocia que gessisti ideo gessisti s. ne ego tutele vel cure possem conveniri.").

directly, forcing the plaintiff to propose positions that prove an intermediate fact from which the fact finder must draw an inference to establish an ultimate fact in issue.

This latter approach can be seen for example in Roffredus's discussion of the *actio in rem praeiudicialis* ("prejudicial action *in rem*"), a form of action used to determine the legal status of a person. One subtype of this action, the *actio in rem praeiudicialis de libertinitate*, lay to prove that a defendant who "conduct[ed] himself as if he were a freeborn person" was in law the plaintiff's "freedman or vassal" and owed a cash payment in lieu of service obligations.[55] Roffredus explains that the action is divisible into three elements: that the defendant "is my serf," that "I manumitted him," and that he holds himself out as freeborn.[56] He then sets forth a series of sample positions for the plaintiff aimed at proving these elements. Unlike like his account of the *actio negotiorum gestorum*, however, his account of this action envisages the possibility that the plaintiff may be unable to prove his case simply by submitting the three elements of the action in the form of positions. Roffredus continues:

> Accordingly, in this form of action the plaintiff should make the following positions. Plaintiff's position: 'I say on my oath that you were my serf.' If the defendant confesses this, fine. If he denies it, however, you should say: 'I say that you were born from my female serf.' And if he confesses this, it follows that he is a serf, per Inst. 1.4 and Cod. 3.32.7. Alternatively: 'I say that you allowed yourself to be put up for sale to my father or to me (me not knowing the circumstances) in order to share in the sale price. And you did share in the price. And you were older than twenty.' See Inst. 1.3; Dig. 40.12.17; Dig. 40.13.5; Cod. 7.16.6. Next: 'I say that I or my father

[55] Id., rub. *de actione in rem preiudiciali pro libertinitate vel vassallia*, at 28a = fol. 14va ("Si libertus alicuius vel vassallus gerat se pro ingenuo negans aliquid tibi debere nomine operarum prestare: potes agere contra illum actione in rem preiudiciali de libertinitate vel vassallia […].").

[56] Id. ("Sed ad hoc ut actio ista competat tot sunt necessaria. In primis quod aliquis sit servus meus et ipsum manumiserim: is enim dicitur libertus qui ex iusta servitute manumissus est ut Inst. de libertinis in principio [Inst. 1.5 pr.]. Item est necessarium quod ille se proclamet in libertatem: et dicat se ingenuum.").

> manumitted you.' Next: 'I say that you deny that you are a freedman and hold yourself out as a freeborn person.'[57]

Roffredus's technique in this example is thus to begin by proposing a position that directly states an element of the plaintiff's claim (e.g., "I say on my oath that you were my serf."), much as he had recommended for the plaintiff bringing an *actio negotiorum gestorum*. Only if the defendant refuses to concede that position is the plaintiff supposed to resort to indirect evidence, such as the fact that the defendant's mother was a serf.

The sample positions that Roffredus gives in *De libellis et ordine iudiciorum* hint that the concept of relevance in *Cum frequens et cotidianus* was likely relatively narrow. Some of Roffredus's sample positions, such as those suggested for the *actio in rem praeiudicialis de libertinitate*, do more than simply restate the elements of a form of action in propositional form. On the whole, however, the jurist adheres closely to the minimum elements of each action when formulating positions. This adherence suggests that a "relevant" position, for him, was one that alleged either an ultimate fact in issue, as did his sample positions for the *actio negotiorum gestorum*, or an intermediate fact from which an ultimate fact could be inferred, as did his sample positions for the *actio in rem praeiudicialis de libertinitate*. A position alleging a circumstantial fact that would need to be combined with many other circumstantial facts to assemble a convincing picture of the case was likely not "relevant" in Roffredus's sense of the word.

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[57] Id. at 28a–b = fol. 14va–vb ("Unde in hac actione actor faciat tales positiones. Positio actoris: Ego dico sacramento meo quod tu fuisti servus meus: si hoc confitebatur, bene est. si autem negabit, dicas: ego dico quod tu fuisti natus ex ancilla mea, et si hoc confitebatur, sequitur quod sit servus, ut Inst. de ingenuis, et C. de rei vindicatione partum. Item dico quod tu passus es te venundari patri meo vel mihi ignoranti ad precium participandum: et precium es participatus: et maior fuisti xx annis, ut Inst. de iure personarum, ff. de lib. ca. liberis, et ff. quibus ad libertatem procla. no. li. l. ultima, C. de libera. causa. non ideo. Item dico quod ego vel pater meus te manumisimus. Item dico quod recusas te esse libertum et geris te pro ingenuo.").

3.3 *Positiones succedunt in locum probationum*

Before ending our survey of admissibility in the law of positions, we should note that Roffredus was not the only lawyer who was formulating norms of admissibility in the late 1230s or early 1240s. *Positiones succedunt in locum probationum*, a second monograph treatise on the law of positions, possibly but not securely attributable to the legist Martinus de Fano, also dates to the period between 1234 and 1245.[58]

The picture we gain from reading this "Martinus de Fano" is in its main lines the same as the picture we gain from reading Roffredus. Like Roffredus, Martinus de Fano accepts the basic doctrinal structure of interrogatories and positions that was developed in the procedural manuals of his predecessors Bencivenne and Tancredus. The discussion in *Positiones succedunt in locum probationum* thus either states expressly or assumes that positions are formulated by parties themselves[59]; that they are usually submitted after joinder of issue and under oath[60]; that a response from the opponent to each position is ordinarily compulsory[61]; and that an affirmative response to a position is a confession, within the meaning of that term in Roman law, of the matter asserted in the position.[62]

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[58] On this date range, see the discussion of primary sources in the appendix to this dissertation. On the biography of Martinus de Fano, see Martino Semeraro, "Martino del Cassero da Fano," in Birocchi et al., *Dizionario*, 2:1291–92; see also Savigny, *Geschichte*, 5:487–95. For present purposes I will assume that *Positiones succedunt in locum probationum* is indeed attributable to Martinus de Fano. The point is not essential to our argument.

[59] Ugo Nicolini, ed., "Martini de Fano *Tractatus positionum*," in *Trattati*, 75 ("Et no[ta] quod posiciones fiunt a partibus […] non autem fiunt a iudice.").

[60] See id. at 68–69, 71.

[61] Id. at 68 ("Generaliter autem dicas quod super omnibus que probari debent […] fieri possunt posiciones et adversarius per iudicem compellitur respondere […].").

[62] See id. at 67 ("[S]i quid ponitur ex una parte et per alteram confiteatur non est super eo de quo confessio facta est ulla probatio adhibenda, quia fides confitenti contra se habenda […].").

This is not to say that the conceptualization of positions in *Positiones succedunt in locum probationum* is entirely derivative or duplicative of other treatments of positions that we have been discussing. One distinctive feature of Martinus de Fano's text vis-à-vis those of Bencivenne, Tancredus, and Roffredus—apparent even in the incipit, *positiones succedunt in locum probationum*—is its particular focus on defining the precise juridical nature of positions in relation to other means of proof. In Martinus de Fano's view, positions are technically not themselves means of proof, presumably because they establish fact on the basis of the opposing party's own concessions of fact rather than on, say, the basis of third-party witness testimony or documentary evidence. These latter sources of evidence were, as we saw in chapter 1, the means of proof par excellence in the Roman legal and rhetorical traditions on which early Roman-canon procedure most heavily relied. Nevertheless, according to Martinus de Fano, positions "take the place of proofs," and consequently are assimilated in all important respects to the general Roman-canon law of proof in the ensuing discussion in *Positiones succeedunt in locum probationum*.[63] The basic conceptual picture of Bencivenne and Tancredus is thus further refined, but not fundamentally altered.

Furthermore, when we turn from the general exposition of the law of positions in *Positiones succedunt in locum probationum* to the text's final section, a more or less systematic survey of norms of admissibility of positions, the broad similarities with Roffredus's *Cum frequens et cotidianus* are again readily apparent. Roffredus set out fourteen categories of inadmissible or potentially inadmissible position in *Cum frequens et cotidianus*; Martinus de Fano sets forth twelve, with several additional categories mentioned in other parts of the text. In *Positiones succedunt in locum probationum* too, most of the categories

[63] See, e.g., id. at 68 ("[P]osiciones succedunt in locum probationum, debent naturam probationum sortiri et immitari […].").

can be grouped for purposes of preliminary discussion under the headings of prejudice and low probative value.

Prejudice. Unlike Roffredus, Martinus de Fano does not discuss specifically the danger of inducing the respondent to commit perjury. But at least three types of position in Martinus's proscribed list still imply a concern with prejudice to the responding party.

Most obviously belonging under this heading is the category of what Martinus de Fano calls "dangerous" positions. A position is "dangerous" (*periculosa*) when the respondent's answer properly depends on the outcome of a collateral proceeding against a third party. The author cites for this point a passage of the *Digest* in which the example is given of a party who is asked whether he is heir to an inheritance while collateral litigation about the disposition of that inheritance remains pending.[64]

Another category that can perhaps be placed under this heading is that of a position that contradicts an earlier litigation posture of the proponent, possibly in another proceeding, unless the proponent can show "just cause" for the contradiction.[65] Aside from revealing the inconsistent litigation stance of the party bearing the burden of proof, allowing such a position probably also would disadvantage the respondent, who would not be able to rely on the representations that his or her opponent had made earlier in the proceeding or in another proceeding.

One further possible addition, found in a slightly different formulation in *Cum frequens et cotidianus*, is any position that is directed against a party who is favored by a

[64] See id. at 77 ("quinto cum est periculosa posicio, ut non possit quis sine periculo confiteri quia pendet ex altera questione, ut [Dig. 11.1.6.1]").
[65] See id. at 78 ("duodecimo quando quis querit extra id quod altera vice posuerat cum videatur sibi ipsi contrarius esse, ut [Dig. 49.4.2.1]; et hoc nisi iustam causam primo quis ignorancie alleget, ut [Dig. 11.1.11.3, 11.1.11.8, 11.1.10.11]").

public policy that protects him or her from having to answer. This seems to be what Martinus de Fano means when he writes that a position is not admissible "if the proceeding is not being held between the persons of the plaintiff and the defendant, as in Dig. 11.1.19."[66] The passage of the *Digest* that Martinus de Fano cites states a special policy favoring a son who is bringing a suit on his father's behalf. The jurist Papinian holds that if a son who has brought an action on behalf of his father refuses to respond to questioning during the proceeding, his silence shall not be construed against him, as would normally be the rule, but instead the hearing shall proceed "as if he had not been questioned."[67]

Low Probative Value. Like Roffredus's *Cum frequens et cotidianus*, moreover, *Positiones succedunt in locum probationum* excludes several categories of position that have insufficient or no probative value. One inadmissible category comprises positions that are "irrelevant to the case" (*impertinencia ad causam*) or, put differently, that "would not contribute to the case" (*non faciant ad causam*), although like Roffredus, Martinus gives no indication of what exactly "relevance" or "contribution to the case" is other than an unilluminating reference to a passage of the *Digest*.[68] Similarly inadmissible, as in *Cum frequens et cotidianus*, is any position that is "obscure or ambiguous" (*obscura sive ambigua*)[69]; that is "two-part or [phrased in the] alternative" (*duplex vel alternativa*),

[66] Id. at 77 ("octavo si non tenet iudicium inter personas actoris et rei, ut [Dig. 11.1.19]").
[67] Dig. 11.1.19 ("Si filius, cum pro patre suo ageret, taceat interrogatus, omnia perinde observanda erunt, ac si non esset interrogatus.").
[68] Nicolini, "Martini de Fano *Tractatus positionum*," 69, 76. The reference is to Dig. 11.1.9; Dig. 11.1.9.6 indicates that in certain circumstances the praetor may conduct a summary inquiry to determine whether it is in fact necessary for a plaintiff's case to put a particular question to the defendant.
[69] Id. at 76–77 ("secundo si est obscura sive ambigua admittenda non est quia omnis posicio est confessio sive asseveracio, ut [Dig. 11.1.11, 34.5.3, 21.2.69.5]").

combining two or more propositions of fact in a single position[70]; that is "superfluous" (*supervacua*)[71]; or that is phrased in negative terms.[72] Several other inadmissible positions with little or no probative value for the dispute, at least in our sense of the word probative, are similarly proscribed. Martinus excludes any position that is irrelevant because it concerns an action of a third party that has no bearing on the rights of the plaintiff and defendant,[73] as well as a position that cannot be probative of the proponent's claim because it is "against nature"—physically impossible.[74] Also barred is any position that is irrelevant because the legal claim that it is meant to support is time-barred.[75]

Finally, arguably outside these two headings are three categories of inadmissible position discussed in *Positiones succedunt in locum probationum* that touch on matters of judicial administration: positions asserting conclusions of law rather than allegations of fact (except, Martinus says, to prove customary norms), positions submitted by parties who lack

[70] Id. at 77 ("sexto est cum duplex vel alternativa posicio ut in exemplo, nam lingua explicanda et ponenda, argumentum [Dig. 47.10.7.4]"); see also id. at 74–75 ("[C]aveas quia tum quidam cavillosi advocati videntur multa implicare in posicione, ut in superiore exemplo: 'ego pono quod tu tali die percussisti Talem clericum in capite, et mortuus est da tali vulnere' […]." Recall that Roffredus's term for this type of inadmissible position is *multiplex*, "multipart."
[71] Id. at 69 ("[S]imili modo [n]ullus admittitur ad ponendum ea que supervacua sunt super causam; facit in hiis [Nov. 49.3.1].").
[72] See id. at 69. Note that here I am accepting Nicolini's view that the part of *Positiones succedunt in locum positionum* in which negative positions are declared admissible is a later interpolation. See Nicolini, *Trattati*, 57.
[73] See id. at 77 ("nono si ponat aliquis de facto alieno de quo non pertinet ius ad actorem vel reum, ut [Dig. 11.1.9.3, 25.2.11.2]").
[74] See id. ("tercio si contra naturam est quod ponitur, ut [Dig. 11.1.13, 11.1.14.1]").
[75] See id. ("decimo si quis faciat posicionem super re tempore finita utputa si res mea que tempore prescripta erat, ut [Cod. 4.30.14.3]").

standing to proceed in court, and positions proffered by a party before issue has been joined.[76]

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We have now surveyed a great number of principles of admissibility found mainly in two juristic treatises of the late 1230s and early 1240s: *Cum frequens et cotidianus*, by the legist Roffredus Beneventanus; and *Positiones succedunt in locum probationum*, possibly by the legist Martinus de Fano. To deepen our understanding of Roffredus's notion of relevance, we also made a brief detour into his *De libellis et ordine iudiciorum*.

The two monographs, together with the two *ordines Invocato Christi nomine* and *Assiduis postulationibus*, are by no means the only sources available for the study of the development of the law of interrogatories and positions up through the first half of the thirteenth century. Several other sources from the same period could be added to our discussion. One is *Sapientiam affectant omnes*, an *ordo* likely of southern French origin from roughly the turn of the thirteenth century that briefly discusses the practice of exchanging interrogatories and responses.[77] The later *ordo Scientiam omnes naturaliter appetunt*,

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[76] See id. at 77–78 ("quarto si quis interroget super iure civili an ius ita velit, quia sic confiteretur ius esse, nisi de consuetudine quereretur quia tunc et posicio fieri et probatio de consuetudine posset dari ut [Cod. 8.10.3, 8.53.1]; ius autem civile romanorum finitum est et ideo nil operatur in eo posicio vel confessio, ut [Dig. 26.6.2]; septimo si pars que posicionem facit nequid in iudicio stare, ut [Dig. 11.1.9.2]; […] undecimo si quis ante litem contestatam faciat posiciones super principali negocio, ut [Dig. 11.1.1]").

[77] See Douai, Bibliothèque municipale, MS 649, fol. 3vb ("Item fiunt interrogationes in iudicio, et ab actore reo, et a reo actori. primo enim debet requiri qui interrogationem fieri uult per sacramentum quod credat et postmodum alterum. Tales autem debent fieri interrogationes, que uel concesse uel negate adeo prest(a)nt cause adminiculum, arg. C. de postulando l. quisquis [Cod. 2.6.6?] et C. de probationibus ad probationem [Cod. 4.19.21?] et ff. de iureiurando siue uoluntario siue necssario l. si duo § ult.(?) [Dig. 12.2.15.6?]. Iudices non a reo uel(?) certas species p(ropositi?)onum admittant, certas respuant, set ubi certum equitas eos mouerit, oportet fieri interrogationem, ut ff. de interrogatoriis actionibus l. penultima [Dig. 11.1.21]. Clara autem debet esse responsio, et non nube plena, ff. de

composed before 1234, most likely in northern France, is dependent on *Sapientiam omnes affectant*.[78] *Scientiam omnes naturaliter appetunt* borrows from and expands the discussion of the law of interrogatories that is found in its predecessor *ordo*.[79] Outside the *ordo* genre, *De positionibus intendentes*, a miniature monograph treatise probably written before about 1245, is devoted to the law of positions.[80] There is substantial discussion of positions in the *Liber cautele et doctrine*, a manual for practicing lawyers composed between 1234 and 1245—the period in which both *Cum frequens et cotidianus* and *Positiones succedunt in locum probationum* were most likely written—by the jurist Ubertus de Bobio.[81] And there are several other midcentury treatments of the law of positions from after 1245.[82]

Nonetheless, the sources we have been examining are sufficient for our purposes. They show the main lines of development in the first half of the thirteenth century: first the efforts to give doctrinal definition to the new technique in *Invocato Christi nomine* and *Assiduis postulationibus*; then, in the late 1230s or early 1240s, the systematic adoption of norms of admissibility in *Cum frequens* and *Positiones succedunt in locum probationum*.

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interrogatoriis actionibus l. de etate § nichil [Dig. 11.1.11.7].”). Proposed dates of composition range from before ca. 1191 to after 1206. The author and the place of composition are also disputed. See Fowler-Magerl, Ordo iudiciorum, 131–32. Yves Mausen, coeditor of a forthcoming edition of the text, takes the position that *Sapientiam affectant omnes* is from southern France. Yves Mausen, email message to author, August 12, 2019.

[78] See Fowler-Magerl, Ordo iudiciorum, 140.

[79] See Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 2, fasc. 1, *Der* ordo judiciarius *“Scientiam”* (Innsbruck: Wagner, 1913), tit. 27 (*De interrogationibus faciendis*), at 44–50.

[80] Paris, Bibliothèque nationale de France, MS lat. 3990C, fol. 264va–vb.

[81] See Ubertus de Bobio, “*Liber cautele et doctrine* (ms. Bologna, Biblioteca comunale dell’Archiginnasio, B2795),” ed. Nicoletta Sarti, in Nicoletta Sarti and Simone Bordini, *L’avvocato medievale tra mestiere e scienza giuridica: Il “Liber cautele et doctrine” di Uberto da Bobbio (...1211-1245)* (Bologna: Il mulino, 2011), 342–50. On Ubertus’s biography see Simone Bordini, “Per un profilo di Uberto da Bobbio: Ricerche e ipotesi di lavoro su un giurista del primo Duecento,” in Sarti and Bordini, *L’avvocato medievale*, 9–98; Nicoletta Sarti, “Uberto da Bobbio (*Ubertus de Bobio* o *Bobiensis*),” in Birocchi et al., *Dizionario*, 2:1989–90; Savigny, *Geschichte*, 5:143–45.

[82] See the discussion of primary sources in the appendix to this dissertation.

4. EXPLAINING THE DOCTRINE

4.1 Functionalist and Intellectual-Historical Explanations

So far in this chapter I have been concentrating on description. But with our survey of principles of admissibility complete, there remains the problem of causation. What explains the relatively sudden appearance in the doctrinal literature of these many new norms?

This dissertation so far has assumed an essentially functionalist[83] explanation for the emergence of the law of positions. Chapter 1 began by arguing that, in the perception of the twelfth-century jurists, the means of proof with widest acceptance in the legal and rhetorical sources—witnesses and documents—were often insufficient to yield socially satisfying outcomes. The jurists undertook to enlarge the repertory of acceptable forms of proof, but as I suggested in chapter 1, these enlargements never encompassed an effective doctrinal mechanism for exploiting the parties themselves, arguably the most valuable evidentiary resources in many proceedings. Chapter 2 argued, however, that dispute-resolution bodies in the late twelfth-century northern and central Italian communes—most likely first in Tuscany, later elsewhere—achieved in practice what the jurists had not achieved in theory, by devising a technique for obtaining evidence from the parties. This technique was all the more effective, I suggested, for its reliance on the inherently more knowledgeable opposing party, rather than on the adjudicator, to frame lines of inquiry. In the present chapter, we began by reviewing efforts of early thirteenth-century lawyers to explicate the new technique of proof in doctrinally acceptable terms; I suggested that these doctrinal terms naturally conduced to

[83] By functionalist I mean an analysis that first searches for "exigencies" present within a particular social system and then seeks to identify reactions that respond to those exigencies and thus "maintain[the] independent existence" of that system. Talcott Parsons, "On Building Social System Theory: A Personal History," *Daedalus* 99 (1970): 849. I do not mean to say that either the "exigencies" or the "responses" are objectively determined. The analysis serves only to reveal a structure of incentives; it does not determine outcomes.

the primary, although by no means exclusive, benefit of the interrogating or proposing party. Now, I have just suggested, the placement of a substantial measure of control over the examination of one party into the hands of that party's opponent precipitated a further doctrinal response in the form of principles of admissibility that counterbalanced party control.[84]

These principles of admissibility can likewise be explained at least in part in functional terms. Two implicit motives for the norms seem especially salient. One is protection of the respondent from abusive questioning by his or her opponent. A concern with the possibility of harm to the responding party pervades the discussions of admissibility in both *Cum frequens et cotidianus* and *Positiones succedunt in locum probationum*. Roffredus devotes two categories of inadmissible position to perjury-inducing positions alone, on top of prohibitions on "superfluous" positions, which risk forcing a party to contradict him- or herself by responding to the same proposition twice, and on "captious" positions, which pose a similar risk by confusing or wearing down the respondent. Martinus de Fano does not discuss perjury per se, but he speaks of positions that are "dangerous" to the respondent.[85]

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[84] It should be obvious that a functionalist analysis of this type would be inadequate if taken to a deterministic extreme. It is a commonplace in contemporary American legal historiography that legal change cannot be explained merely in terms of a series of objective social exigencies or "needs" and consequent doctrinal "responses." Social life is too diverse for such "needs" to be objectively identifiable. And even if such needs were identified, the causal nexus between a given identifiable need and a specific doctrinal response would remain "radically underdetermined." Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 100–101. Such an analysis would still leave unanswered the question of why the specific doctrinal form that was adopted was chosen, and not some other doctrinal form. See id. at 125.

[85] The tone is even more alarmist in the *Liber cautele et doctrine*. Ubertus de Bobio warns his lawyer readers that in encouraging clients to deny positions falsely, there is "a double damage: damage to the soul, which is an incalculable damage that must be avoided […] and there is also the pecuniary damage that the client incurs." Ubertus de Bobio, "*Liber cautele et doctrine*," 343 ("[H]abent duplex danpnum, anime, quod est danpnum inextimable et

Even the authors' exclusion of irrelevant positions implies a protective motive, although neither author says so explicitly. In an observation in *Invocato Christi nomine*, Bencivenne remarked that a confession made in response to an interrogatory had res judicata effect in subsequent proceedings.[86] Bencivenne's observation suggests that a party factual inquiry ranging outside the scope of a given form of action could in theory be used against the respondent in other proceedings.

Less directly attested, but still in my view salient in the doctrine, is an additional motivation for the norms: mediation of the structural tension in an adversarial proceeding between the subjective informational needs of the adjudicator on the one hand and the particular line of factual inquiry pursued by a given party on the other hand. In a procedure in which the adjudicator is responsible for framing questions to ask the parties, the adjudicator asks about whatever interests him. But in a procedure that accords the party bearing the burden of proof the right to use his or her opponent as a source of proof, a party may well range into matters that are of no interest to the fact finder. We should thus be unsurprised to find norms in both *Cum frequens et cotidianus* and *Positiones succedunt in locum probationum* that stop the interrogant or proponent from trenching on the responsibilities of the adjudicator and from making inquiries that fail to satisfy the adjudicator's informational needs. Accordingly, both texts ban positions of law, and Martinus also bans positions that are put to the respondent at the wrong time in the proceeding, before joinder of issue; with these positions the proponent attempts to go beyond the narrow fact-producing role that he or she is

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evitandum, ut in auth. Ut cum de appellatione cognoscitur [Nov. 115] et est etiam danpnum pecunie quod incurrit clientulus.").

[86] See Wahrmund, *Quellen*, vol. 5.1, tit. 25, at 49 ("Item multotiens queri consuevit, an confessio in uno iudicio facta preiudicet in altero apud iudicem super eadem re et questione? Et potest responderi, quod sic, ut [arg. Cod. 7.16.41] et [arg. Dig. 11.1.6]. Et ad hoc idem est bonum argumentum [Cod. 7.52.6] et [arg. Cod. 2.55(56).5.4].").

assigned. The motive of stopping factual inquiries that fail to fulfill the adjudicator's informational requirements also seems implicit in the norms excluding positions that are of low probative value because they are "irrelevant," "do not contribute to the case," or for some other reason.[87]

Now, it should be clear that the functionalist considerations I just outlined are not enough on their own to provide an adequate account of the doctrine of positions. In particular, although they bring out the causal significance of certain structural features of Roman-canon procedure, they do not offer much explanation of why the doctrine took *the specific form* that it did. It is at this point, therefore, that we must address an alternative, intellectual-historical mode of analyzing this new area of law.

Practically the only such analysis of the Roman-canon law of positions appears in a monograph treatment by Alessandro Giuliani of the epistemological presuppositions of the

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[87] An alternative account, not necessarily incompatible with the one that I have been giving here, could explain the relevance norms as a response to the pressure of time in a trial proceeding—in the words of Oliver Wendell Holmes, Jr., "a concession to the shortness of life." *Reeve v. Dennett*, 11 N.E. 938, 944 (Mass. 1887). There are reasons to think, however, that concern with waste of time in itself may have been a most a secondary concern of civilian and canonist theorists. In the first place, Roman-canon procedure tended to produce drawn-out, unconcentrated proceedings by design. The slow movement of a proceeding helped ensure, to the medieval mind, that a defendant was not wrongly deprived of his or her rights. See Fowler-Magerl, Ordo iudiciorum, 1–2. Moreover, the procedural writers understood the sources of Roman law to require that a separate hearing be granted for each of the many stages of a proceeding. On this so-called *Reihenfolgeprinzip* ("principle of seriality"), see Knut Wolfgang Nörr, "Reihenfolgeprinzip, Terminsequenz und 'Schriftlichkeit': Bemerkungen zum römisch-kanonischen Zivilprozeß," in Iudicium est actus trium personarum*: Beiträge zur Geschichte des Zivilprozeßrechts in Europa* (Goldbach, Ger.: Keip, 1993), ch. 2. The rebarbative length of some sets of positions that survive from the thirteenth century also suggests that the duration of time devoted to exchanging positions and responses was in practice not always considered problematic. For a lengthy thirteenth-century example from outside the period on which this dissertation concentrates, see Anna Maria Duri, ed., *Il comune di Viterbo contro Orso Orsini: Atti del processo di appello, 1288–1290* (Viterbo: Consorzio per la gestione delle biblioteche comunale degli "Ardenti" e provinciale "A. Anselmi," 2009), 83–91.

law of proof or evidence in Western legal thought.[88] In Giuliani's account, juridical proof was understood in the twelfth century as a form of "probable knowledge," absolute knowledge being unattainable in the human world. Such knowledge could be attained by a process of argument in which opposing views were contrasted with one another in a dialectical disputation and the better view selected as the "probable" truth. As we saw in chapter 1 and as Giuliani's own exposition makes clear, the conception of proof as a form of probable rather than absolute knowledge achieved by a process of argument was inherited from the ancient rhetorical tradition, transmitted to lawyers through basic education in the trivium, and thus predated the twelfth century.[89] But in Giuliani's view, this conception of proof-by-argument took on a new character over the course of the twelfth century as a consequence of the rediscovery of the *Topics* of Aristotle. Book 8 of the *Topics* in particular describes a highly formal method of dialectical argument, with strict rules of engagement. Two parties would select a controversial "problem" (πρόβλημα) or "thesis" (θέσις) for discussion about which they would exchange a series of questions and responses, with one party taking a position for the proposition, the other against it, in order to determine whether the proposition was or was not true.[90] For Giuliani, the technique of positions resulted from the reception of this idea of dialectical disputation from Aristotle's *Topics* into the existing substrate of legal thought, already infused with the idea of proof-by-argument. Among the lawyers, the existing

[88] Alessandro Giuliani, *Il concetto di prova: Contributo alla logica giuridica* (Milan: Giuffrè, 1961). Only the part of Giuliani's monograph dealing directly with the law of positions concerns us here.
[89] See id. at 117–38; see also supra text accompanying chapter 1, notes 60–66.
[90] See the description of the exercise in Paul Moraux, "La joute dialectique d'après le huitième livre des *Topiques*," in *Aristotle on Dialectic: The "Topics"; Proceedings of the Third Symposium Aristotelicum*, ed. G. E. L. Owen (Oxford: Clarendon Press, 1968), 278–85.

conception of proof-by-argument, drawn from the rhetorical tradition, offered fertile ground for Aristotelian dialectic.[91]

We thus have two potentially competing explanations of the emergence of the law of positions: one functionalist, the other intellectual-historical. To what extent is the intellectual-historical explanation valid?

4.2 Problems with an Intellectual-Historical Explanation: Timing and the Origin of *positio*

Giuliani's intellectual-historical explanation of the law, if I have reported it accurately, cannot be entirely right.

At first glance, it may seem almost self-evident that the *Topics* of Aristotle was a source of inspiration for the invention of the techniques of interrogatories and positions. Not only does the *Topics* describe a mode of dialectical argument in which opposing viewpoints are set against one another in order to arrive at proof of a proposition, much like the exchange of interrogatories or positions and responses. The Latin translation of the *Topics* produced by the late antique philosopher Boethius even uses the word *positio* to render the Greek πρόβλημα and θέσις, the words with which Aristotle designates the proposition to be proved or disproved in the dialectical exercise.[92]

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[91] See Giuliani, *Concetto*, 151–58, 161–73. Giuliani identifies John of Salisbury as a likely intellectual intermediary between Aristotelian dialectic and law. See id. at 169.

[92] See, e.g., Lorenzo Minio-Paluello, ed., "Translatio Boethii," pt. 1 of *Topica: Translatio Boethii, fragmentum recensionis alterius et translatio anonyma*, vol. 5, pts. 1–3 of *Aristoteles Latinus* (Brussels: Desclée de Brouwer, 1969), para. 1.11, at 18 ("Paene autem nunc omnia dialectica problemata positiones vocantur."); id., para. 8.3 ("Non ergo oportet latere, quando difficile argumentabilis est positio […]."). The attribution of the translation to Boethius, in doubt in the mid-twentieth century, has since been confirmed. See Lorenzo Minio-Paluello, "Note sull'Aristotele latino medievale," pts. 5–6, *Rivista di filosofia neo-scolastica* 44 (1952): 398–401.

On closer inspection, however, the hypothesis of a specifically Aristotelian origin of positions is problematic. One problem is timing. The legists, at least, seem not to have been familiar with the *Topics* of Aristotle until long after the techniques of interrogatories and positions had already emerged. The technique of interrogatories and confessions or denials dates to at least as far back as the 1170s, whereas the earliest doctrine, given by Bencivenne in *Invocato Christi nomine*, and the term *positio* itself both date to at least as far back as the turn of the thirteenth century. Yet although the late twelfth-century jurist and Greek translator Burgundio of Pisa mentions the existence of Boethius's Latin translation already in 1173, there is no clear evidence of the use of the *Topics* of Aristotle in the writings of the medieval Roman lawyers until after the first third of the thirteenth century.[93] This lag should not surprise us. Even in Latin translation, the *Topics* of Aristotle is a difficult text, requiring specialized philosophical knowledge to understand. The twelfth- and early thirteenth-century jurists, whose training in philosophy rarely went beyond elementary instruction in logic, were hardly likely to have been in the vanguard of users of the ideas in the text.

Another problem is that the meaning of the Latin word *positio* in the law of positions does not closely resemble the meaning of the word in the Boethian translation of the *Topics*. *Positio* in the Boethian translation of the *Topics* is the initial problem or proposition to be debated, ideally a controversial opinion held by a well-known philosopher: a *positio*,

[93] See Charles Homer Haskins, *Studies in the History of Mediaeval Science* (Cambridge, Mass.: Harvard Univ. Press, 1924), 232n37 (quoting Vatican City, Biblioteca apostolica vaticana, MS Ottob. lat. 227, fol. 2r ("Sed et Boetius […] Aristotilem […] in Topicis […] ex greca latine reddidit lingue.")); Gerhard Otte, "Aristoteleszitate in der Glosse: Beobachtungen zur philosophischen Vorbildung der Glossatoren," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 85 (1968): 375–76; Gerhard Otte, *Dialektik und Jurisprudenz: Untersuchungen zur Methode der Glossatoren* (Frankfurt am Main: Klostermann, 1971), 22, 26, 140n97. A careful study of the reception of Aristotle in another northern Italian city, Padua, found no evidence there of knowledge of the *Logica nova*, including the *Topics* of Aristotle, until into the thirteenth century. See Paolo Marangon, *Alle origini dell'aristotelismo padovano (sec. XII–XIII)* (Padua: Antenore, 1977), 16–17.

according to the translation, "is an opinion, not one's own, of someone from among those who are known in philosophy."[94] *Positio* in Boethius's translation of Aristotle is thus not what a *positio* is in Roman-canon procedure. It is not a philosophical proposition to be debated by two sides. Rather, it is a factual proposition that *one of the two sides* in a debate is asserting as his or her own.

4.3 A Possible Rhetorical Origin of the Word *positio*

Insofar as Giuliani saw the conceptual origin of positions specifically in the reception of Aristotle's *Topics*, then, his intellectual-historical account of this area of law is probably untenable. Giuliani was correct, however, in a different sense. Even before the reception of the *Topics* of Aristotle, twelfth-century legal thought was already infused with ideas drawn from basic texts of the trivium, the three medieval liberal arts of grammar, rhetoric, and logic that constituted the basic foundation of education throughout the Middle Ages.

Of these arts, logic and rhetoric had a particularly close connection to the law in the twelfth century. In varying measures depending on the individual jurist, the twelfth-century legists and canonists drew on basic techniques that they had learned from the ancient logical and rhetorical texts available to them in order to interpret the *Corpus iuris* and the canon law.[95] Moreover, logic and rhetoric were also closely linked to one another. Certain basic

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[94] Minio-Paluello, "Translatio Boethii," para. 1.11, at 17 ("[P]ositio autem est opinio extranea alicuius notorum secundum philosophiam."). Cf. Aristotle *Top.* 1.11 ("[Θ]έσις δέ ἐστιν ὑπόληψις παράδοξος τῶν γνωρίμων τινὸς κατὰ φιλοσοφίαν […].").

[95] For an overview of the twelfth-century glossators' use of logic and rhetoric, with references to the literature, see Ronald G. Witt, *The Two Latin Cultures and the Foundation of Renaissance Humanism in Medieval Italy* (Cambridge: Cambridge Univ. Press, 2012), 242, 402–3, 426–27. The most nuanced treatment of the glossators' use of logic is Bruno Paradisi, "Osservazioni sull'uso del metodo dialettico nei glossatori del sec. xii," in *Studi sul medioevo giuridico* (Rome: Istituto storico italiano per il medio evo, 1987), 2:695–709 (arguing that the earliest glossators (Irnerius, Martinus, Bulgarus) make only limited use of logic but that a more intensive use can be found later in the century, first in Rogerius and

concepts of ancient logic, especially basic notions of dialectical argument, were most readily accessible to twelfth-century readers not in texts on logic proper, but in rhetorical texts.

It is likely from this rhetorical tradition, not from Aristotle's *Topics*, that lawyers at the turn of the thirteenth century borrowed our word *positio* in its legal sense and applied it to the new technique of proof that we have been studying.

This conclusion is not immediately obvious. *Positio* is not an especially unusual word in either classical or medieval Latin. The word *positiō*, derived from the verb *pōnō*, meaning "to put, place," or by extension "to posit, assert," is an ordinary Latin deverbal noun that is attested in Latin literature from the imperial period onward.[96] In classical Latin *positio* had the basic meaning of "act or effect of placing," including the spatial "placement," "situation," or "arrangement" of a thing, but it also could have the figurative sense of an "affirmation" or "assertion" made in an argumentative context.[97] This latter meaning is the one that is used in

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especially in the work of Placentinus, Johannes Bassianus, and Pillius); see also the more detailed but less diachronically differentiated treatment of Otte, *Dialektik und Jurisprudenz*. For older discussion, see especially Biagio Brugi, "Il metodo dei glossatori bolognesi," in *Studi in onore di Salvatore Riccobono nel xl anno del suo insegnamento* (Palermo: Arti grafiche G. Castiglia, 1936), 1:21–31 (using sources from different periods without sufficient caution); Erich Genzmer, "Die iustinianische Kodifikation und die Glossatoren," in *Atti del Congresso internazionale di diritto romano (Bologna e Roma, xvii–xxvii aprile MCMXXXIII): Bologna* (Pavia: F. Fusi, 1934), 1:399–402, 415–18, 427–28 (weighing carefully the possibility of influence on the glossators of logical techniques used in the *Corpus iuris* itself as well as logical techniques described in the logical and rhetorical texts). The only extended legal-historical accounts of the subject in English oversimplify the history of the application of logic to law by assuming that a single "scholastic method" was applied from the mid-twelfth century onward, first in canon law and thereafter in Roman law. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard Univ. Press, 1983), 131–51; Harold J. Berman, "The Origins of Western Legal Science," *Harvard Law Review* 90 (1977): 908–30.

[96] Alfred Ernout and Antoine Meillet, *Dictionnaire étymologique de la langue latine: Histoire des mots*, 4th ed. (Paris: Klincksieck, 1959), v. "pōnō."

[97] *Thesaurus linguae Latinae*, vol. 10, fasc. 2 (Leipzig: Teubner, 1980), v. "positio." For the more specific sense of "affirmation" or "assertion" in an argumentative context, see id., para. (I)(B)(1)(a)(α).

the procedural records we have seen: an "affirmation" or "assertion" of a fact, a "position," set in opposition to the response of an opponent.

This more specific sense of *positio* is not so easy to find in sources with which we can expect the lawyers to have been familiar, however. For one thing, the word is to my knowledge not ordinarily used in twelfth-century case records to describe an argument or assertion of a party. Nor is *positio*'s verbal congener *pono* used in that sense. A variety of other words were used instead to describe arguments, allegations, and assertions: verbs such as *dico* "to say," *assero* "to assert," *affirmo* "to affirm," and *allego* "to allege," and nouns such as *ratio*, here meaning something like "argument."

Positio in the sense of "assertion" or "allegation" is not found in the *Corpus iuris* or *Decretum* either. To begin with the *Corpus iuris*: in the *Digest*, *positio* is used to describe both physical "position" or "situation"[98] and more figuratively the "situation" or "condition" of property,[99] as well as an "established" subfield of the law[100]; in the *Code*, *positio* designates in one passage the "use" or "setting down" of specific words in a will.[101] As for canon law, in the text of the standard edition of the *Decretum* the word *positio* appears only once, in the phrase *veram stellarum positionem*, "the true position of the stars," a sense of *positio* that is obviously not pertinent to the discussion here.[102] In papal legislation, the word

[98] Dig. 41.2.1 pr.
[99] Dig. 15.1.11.3, 33.1.3.3.
[100] Dig. 1.1.1.2 = Inst. 1.1.4. All passages are given in *Vocabularium iurisprudentiae Romanae*, vol. 4, fasc. 3–4 (Berlin: Walter de Gruyter, 1985), v. "positio."
[101] See Cod. 6.29.4.1; Robert Mayr-Harting, ed., *Vocabularium Codicis Iustiniani*, vol. 1, *Pars Latina* (Prague: Česká grafická unie, 1923), v. "positio."
[102] C. 26 q. 2 c. 6, in Emil Friedberg, ed., *Corpus iuris canonici*, vol. 1, *Decretum magistri Gratiani* (Leipzig, 1879).

does not appear at all before the second quarter of the thirteenth century in the decretals that were later compiled in the *Liber Extra* and the *Sext*.[103]

If we turn from the texts of Roman and canon law to widely read texts of logic, we again find occasional use of the word *positio*, but again not in the sense relevant to us here. Only some of the ancient texts on logic that are now known to us were widely available in twelfth-century central and northern Italy. These were mainly those texts that formed the canon known as the *Logica vetus* ("Old Logic"): translations from Greek into Latin, produced by the late antique philosopher Boethius, of the *Isagoge* of Porphyry and the *Categories* and *On Interpretation* of Aristotle; commentaries of Boethius on the *Isagoge* in the Latin translations of that text produced by Marius Victorinus and by Boethius himself; a commentary of Boethius on the *Categories*; two commentaries of Boethius on the *On Interpretation*; an incomplete commentary of Boethius on the *Topica* of Cicero; and several independent writings of Boethius, namely the *Introductio ad syllogismos categoricos*, *De syllogismo categorico*, *De divisione*, and *De differentiis topicis*.[104] A medieval treatise wrongly attributed to Gilbert de la Porrée, the *Liber sex principiorum*, was also included in the *Logica vetus*.[105]

Of these texts, only some were clearly cited or alluded to by the twelfth-century glossators.[106] But even taking for granted that the entire *Logica vetus* was known to the

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[103] See X 1.6.54, 2.5.1; VI 2.9.1, .10.2, .11.3, in Emil Friedberg, ed., *Corpus iuris canonici*, vol. 2, *Decretalium collectiones* (Leipzig, 1879).
[104] Martin Grabmann, "Aristoteles im 12. Jahrhundert," in *Mittelalterliches Geistesleben: Abhandlungen zur Geschichte der Scholastik und Mystik*, ed. Ludwig Ott (Munich: Max Huber, 1956), 3:65, 68.
[105] Id. at 65.
[106] See the examples, covering only the legists, not the canonists, in Otte, *Dialektik und Jurisprudenz*, 22–27. Further references, not all genuine, are in Otte, "Aristoteleszitate," 369–70.

legists and canonists by the end of the twelfth century, we still find no sign in any of these texts of the meaning of *positio* that is relevant for our purposes. Within the *Logica vetus*, the word does appear in the Latin version of the *Categories*, but its meaning there is that of the arrangement or spatial positioning of something.[107] Use of *positio* in this sense can also be found in Boethius's commentary on the *Categories*[108] as well as in the *Liber sex principiorum*, an anonymous text that elaborates on the content of Aristotle's *Categories*.[109] Boethius's commentary on Cicero's *Topica* uses *positio* in a different sense, meaning roughly a "logical proposition," but here too the context is remote from anything that might resemble the procedural concept of position that occupies us.[110] The text of Cicero's *Topica* itself does not use the word at all.[111]

Even if we look beyond the canon of texts of the *Logica vetus* toward other important Latin-language texts on logic that circulated in the late twelfth century, no obvious model for our sense of the word *positio* presents itself. One place to look is in the *Logica nova* ("New

[107] Consider, for example, this passage in which Aristotle divides the descriptive category of quantity into different subtypes: "Quantity is either separated and discrete or continuous; and it consists either of parts that have a position in relation to one another, or of parts that do not have a position [in relation to one another]. Lorenzo Minio-Paluello, ed., *Categoriae vel Praedicamenta*, vol. 1, pts. 1–5 of *Aristoteles Latinus* (Bruges: Desclée de Brouwer, 1961), cap. 6 ("Quantitatis aliud est continuum, aliud disgregatum atque discretum; et aliud quidem ex habentibus positionem ad se invicem suis partibus constat, aliud vero ex non habentibus positionem."); see also id., cap. 7.

[108] See, e.g., "An. Manl. Sev. Boetii In Categorias Aristotelis," in *PL* 64:159B, 252A–B, 207C.

[109] See, e.g., Lorenzo Minio-Paluello, ed., *Categoriarum supplementa: Porphyrii Isagoge, translatio Boethii et anonymi fragmentum vulgo vocatum "Liber sex principiorum,"* vol. 1, pts. 6–7 of *Aristoteles Latinus* (Bruges: Desclée de Brouwer, 1966), cap. 60 ("Positio vero est quidam situs partium et generationis ordinatio secundum quam dicuntur vel stantia vel sedentia vel aspera vel lenia vel quomodolibet aliter disposita […].").

[110] See "An. Manl. Sev. Boetii In Topica Ciceronis commentariorum libri sex," in *PL* 64:1134B ("Sed idcirco rata positio est, quia consequentium repugnantia facta per mediam negationem alia negatione destruitur, et ad vim affirmationis omnino revocatur.").

[111] Although the *Topica* of Cicero is not a part of the *Logica vetus* canon, it is worth mentioning that the glossators cite it too. See Otte, *Dialektik und Jurisprudenz*, 24. Whether they had firsthand or only indirect knowledge of the text is of course unknown.

Logic"). The *Logica nova* was a canon of four additional texts of Aristotle on logic that began to circulate more widely in late antique and new Latin translations from about 1120 onward: the *Prior Analytics*, *Posterior Analytics*, *Sophistical Refutations*, and *Topics*.[112] We already saw, however, that the sense of *positio* in Aristotle's *Topics* is distinct from ours. A pertinent sense of the word cannot be found in the other *Logica nova* texts either.

Outside the *Logica nova* and other ancient sources of logic, significant twelfth-century texts on logic that use the word *positio* are not hard to find. But in these texts too, the senses of *positio* are largely the same as those we have already encountered. Among major texts from northern Europe, Abelard's *Dialectica*, for example, uses the word to mean (roughly) "location" or "spatial arrangement," perhaps following the Latin translation of the *Categories* of Aristotle, whereas in his glosses on Aristotle's *On Interpretation* the word *positio* is used for among other purposes to refer to the "setting down" or identification of the point in time in which a particular logical proposition holds true.[113] John of Salisbury uses *positio* in his discussion of dialectic in the same sense as the Latin translation of Aristotle's *Topics*,[114] as does the anonymous *Ars Emmerana*, a text from the third quarter of the twelfth

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[112] For the reception history, see generally Grabmann, "Aristoteles im 12. Jahrhundert," 68–88, 94–122; Martin Grabmann, *Die Geschichte der scholastischen Methode*, vol. 2, *Die scholastische Methode im 12. und beginnenden 13. Jahrhundert* (Freiburg im Breisgau: Herdersche Verlagshandlung, 1911), 64–81.

[113] See, e.g., Petrus Abaelardus, Dialectica*: First Complete Edition of the Parisian Manuscript*, ed. L. M. de Rijk, 2nd ed. (Assen, Neth.: Van Gorcum, 1970), 56, 71, 81; Lorenzo Minio-Paluello, ed., "Glosse magistri Petri Abaelardi super Periermenias capp. xii–xiv," in *Twelfth Century Logic*, vol. 2, *Abaelardiana inedita* (Rome: Edizioni di storia e letteratura, 1958), cap. 68 ("[O]portet nos facere in ipsa determinatione quandam positionem temporis quo non sedet."). Abelard's *Sic et non* does not use the word. See Peter Abaelard, Sic et non*: A Critical Edition*, ed. Blanche B. Boyer and Richard McKeon (Chicago: Univ. of Chicago, 1977).

[114] See J. B. Hall, ed., *Ioannis Saresberiensis Metalogicon* (Turnhout, Belg.: Brepols, 1991), cap. 15 ("Est autem dialectica propositio contra quam sic in pluribus se habentem, non est instantia, id est argumentum ad positionem.").

century.[115] The one known central or northern Italian treatise on logic from the twelfth century, the *Summa dialectice artis* of William of Lucca, perhaps comes closer to using *positio* in the sense that concerns us. At various points in the text William uses *positio* simply to designate a logical "proposition," taking the word as a near synonym of the Latin noun *propositio*.[116]

Where we do finally find a close match for our sense of *positio* is in rhetoric. Admittedly, most of the texts of the ancient rhetorical tradition that were likely to have been accessible to the lawyers,[117] in the original or through a medieval commentary, do not contain any relevant use of the word *positio*. The *De inventione* of Cicero and the anonymous *Rhetorica ad Herennium* make no use of the word at all. The sections on logic and rhetoric of the encyclopedic *Etymologiae* of Isidore of Seville and *Institutiones divinarum et saecularium litterarum* of Cassiodorus, for their part, speak of *positio* only in the sense of "location."[118]

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[115] L. M. de Rijk, ed., "Ars Emmerana," in *Logica modernorum: A Contribution to the History of Early Terminist Logic* (Assen, Neth.: Van Gorcum, 1967), 2.2:148 ("Disputationis autem tres sunt partes: positio, oppositio, responsio. […] Positio est extranea opinio alicuius notorum secundum philosophiam ut positio Zenonis nichil moveri, positio Heracliti omnia moveri."); see also id. at 2.1:400 (date of composition).

[116] See, e.g., Guglielmo, *Summa dialectice artis: Dal codice 614 (sec. XII) della Biblioteca Feliniana di Lucca*, ed. Lorenzo Pozzi (Padua: Liviana, 1975), cap. 3.18 ("Sed nec illa 'quidam homo qui est lapis non est lapis' vera est, cum inpossibile proponat: etenim in subiecta oratione quedam sit positio 'lapis in homine,' dum dicitur 'quidam homo qui est lapis' et, hac retenta positione, postea 'lapis' separatur ab 'homine' qui 'lapis' iam esse positus esset. […] Quapropter dividentes esse non possunt cum falsam positionem in subiecto faciant.").

[117] For these texts see Paul Oskar Kristeller, "Philosophy and Rhetoric from Antiquity to the Renaissance," in *Renaissance Thought and Its Sources*, ed. Michael Mooney (New York: Columbia Univ. Press, 1979), 241; Richard McKeon, "Rhetoric in the Middle Ages," *Speculum* 17 (1942): 13.

[118] See Cassiod. *Inst.* 2.3.10; Isid. *Etym.* 2.26.8.

But there is one widely read[119] text dealing with rhetoric in which our sense of *positio* does appear: the fifth-century encyclopedia *De nuptiis Philologiae et Mercurii* of Martianus Capella. In book 5, the part of the text dealing with rhetoric, Martianus provides several lists of different forms of argument that can be used to establish proof. In one of these lists, Martianus surveys the forms of argument that one can use to evaluate the legality of a particular act.[120] Martianus's list runs as follows:

> There are ten [sources of argument] about an act: from likeness—of which there are five kinds: example, similitude, story, image, [and] vignette, which is taken from comedy. Some also add allegories, like those of Aesop. Now to continue the [list]: about an act there are sources of argument from the dissimilar; from the equal; from the contrary, through position and negation (*per positionem et negationem*); and in relation to something […].[121]

This passage is somewhat arcane, and partly corrupted. What is important for our purposes is simply that, in a passage discussing proof by rhetorical argument, one of the listed forms of

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[119] See Marziano Capella, *Le nozze di Filologia e Mercurio*, trans. Ilaria Ramelli (Milan: Bompiani, 2001), 1013 ("Marziano fu nel Medioevo il più importante e più letto autore di libri sulle arti liberali […]."). But see Otte, *Dialektik und Jurisprudenz*, 21 ("Bezeichnenderweise werden […] Martianus Capella und Cassiodor von den Glossatoren überhaupt nicht erwähnt.").

[120] This list, which was borrowed from the text of an earlier rhetorician (Fortun. *Rhet.* 2.23), is material that fell under a complicated branch of ancient rhetoric known as the theory of "status." Status theory developed a typology of the different kinds of question of fact or law that could arise in a forensic or deliberative context and the different kinds of argument that could be used to resolve them. For a lucid (albeit disputed) account of the content of this theory in its earliest form, see Karl Barwick, "Zur Erklärung und Geschichte der Staseislehre des Hermagoras von Temnos," *Philologus* 108 (1964): 80–101. On the *positio/negatio* form of argument (in Greek, κατάφασις/ἀπόφασις) within this theory, see Josef Martin, *Antike Rhetorik: Technik und Methode* (Munich: C. H. Beck, 1974), 28–30.

[121] Mart. Cap. 5.558 ("[C]irca rem loci sunt decem: a simili, cuius species sunt quinque: exemplum, similitudo, fabula, imago, † id est veri simile, quod de comoedia sumitur. addunt quidam et apologos, ut sunt Aesopi. ergo circa rem locos exsequar, qui sunt a dissimili, a pari, a contrario, per positionem et negationem, ad aliquid […]."); translation adapted from William Harris Stahl and Richard Johnson, trans., *Martianus Capella and the Seven Liberal Arts*, vol. 2, *The Marriage of Philology and Mercury* (New York: Columbia Univ. Press, 1977), 210.

argument is one in which a statement (*positio*) is set in opposition to a denial (*negatio*). This use of *positio* in the sense of an assertion presented in a rhetorical contest and opposed to a respondent's denial[122]—rather than a meaning of *positio* derived from a text of Aristotelian logic, such as Boethius's Latin translation of the *Topics*—is the one that comes closest by far to the use of *positio* that we find in the procedural sources at the turn of the thirteenth century.

The lengthy search we have been making for possible origins of the procedural term *positio* may well have been futile. In the absence of direct evidence of the circumstances in which the jurists adopted the word, any conclusion about the origins of the term *positio* can never rise above the level of a plausible conjecture. There are other logical and rhetorical texts and associated medieval commentaries we have not considered. The jurists might also simply have back-formed the procedural sense of *positio* from the Latin verb *pono*, which writers of logical texts commonly used in the sense of "to assert, to posit."[123] They might have invented this sense of *positio* independently. They might even have borrowed the word from somewhere, perhaps from a text on logic, but then altered its meaning. None of these possibilities can be excluded.

Nonetheless, a possible connection between *positio* in the law and *positio* in the rhetoric of Martianus Capella is suggestive. If true, the borrowing fits within a broader pattern in both Roman and canon law that is detectible in writings of the jurists from the last two decades of the twelfth century. Law teachers at Bologna had long been conducting their

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[122] See *Thesaurus linguae Latinae*, vol. 10, fasc. 2 (Leipzig: Teubner, 1980), v. "positio," para. (I)(B)(1)(a)(α)(ii).

[123] For examples in the writing of a thirteenth-century logician of northern Italian origin, see *Venerabilis patris Monetæ Cremonensis* […] *Adversus Catharos et Valdenses libri quinque* […] (Rome, 1743), 88a, 129b, 146a, passim. On Moneta of Cremona, see Witt, *Two Latin Cultures*, 409.

teaching and writing with an eye toward the practical application of the law. To give just one example, already in the first half of the century, the early glossator Bulgarus manifested such a practical orientation in his formulation of *regulae iuris* ("rules of law"), short statements of general legal principle abstracted out of the mass of source material in the *Digest* and aimed, in Bulgarus's case, at clarifying the law of procedure.[124] But from at least the early 1180s the mode of practical instruction offered in the writings of certain canonists and legists noticeably changed. This new mode placed particular emphasis on teaching lawyers to work through practical legal problems by setting principles or arguments pro and contra in opposition to one another and then working dialectically through the opposing arguments in order to reach a workable solution. The technique thus learned was one that practicing lawyers could later apply to counter opponents and convince judges in forensic argument.[125]

Two legal genres testify to this shift in focus. One is the genre of the brocard (*brocardum*). A brocard is a norm usually expressed in the form of a short general proposition supported by citations from Roman or canon law, some supporting, others contradicting the proposition. The citations, both pro and contra, enable the reader to work out the full extent of application of the proposition.[126] Although the ultimate origin of

[124] See Emanuele Conte, Il *Digesto* fuori dal *Digesto*," in *Interpretare il* Digesto*: Storia e metodi*, ed. Antonio Padoa-Schioppa and Dario Mantovani (Pavia: IUSS Press, 2014), 288–91.
[125] On this change, see Ennio Cortese, *Il diritto nella storia medievale*, vol. 2, *Il basso medioevo* (Rome: Il cigno Galileo Galilei, 1995), 147–59 (focusing on the writing of glossators Pillius of Modena and Johannes Bassianus); Witt, *Two Latin Cultures*, 426–27.
[126] Stephan Kuttner, "Réflexions sur les brocards des glossateurs," in *Mélanges Joseph de Ghellinck, S. J.*, vol. 2, *Moyen Âge, époques moderne et contemporaine* (Gembloux, Belg.: J. Duculot, 1951), 767 ("une certain pensée normative qu'on exprime, pour la plupart, par une brève maxime et dont, à l'aide de références parallèles (*concordantiae*) et opposées (*contraria*), on éprouve la solidité, c'est-à-dire si et dans quelle mesure elle peut servir de règle générale").

brocards is uncertain,[127] a change in the deployment of the genre can be detected from about the beginning of the 1180s. First the canon lawyer Sicard of Cremona, then the anonymous author of a canon-law treatise on the law of presumptions (*Perpendiculum*), as well as the legist Pillius, in his teaching manual the *Libellus disputatorius* (roughly, "Manual for Disputation"), composed collections of brocards that they had designed for lawyers' use in forensic practice and that they organized systematically in accordance with theoretical principles borrowed from treatises on rhetoric.[128]

The other pertinent genre is the *quaestio disputata* ("disputed question"), a text consisting in its developed form of a brief fact pattern, a question of law arising out of the facts, a discussion of arguments on two sides of the question, and a proposed solution.[129] The genre emerged from the classroom practice of conducting disputations on questions of law in order to train law students in legal argument.[130] Here too, the influence of rhetorical technique was strong. Although the origins of the genre lie near the beginning of the school at Bologna, a change took place in the last decades of the twelfth century. Some teachers,

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[127] See Cortese, *Il diritto nella storia medievale*, 2:149, 150–51; Kuttner, "Réflexions," 777.
[128] See Cortese, *Il diritto nella storia medievale*, 2:148–53 (discussing Pillius's *Libellus disputatorius*); Kuttner, "Réflexions," 783–88 (identifying French intellectual influences on Sicard's work); Albert Lang, "Rhetorische Einflüsse auf die Behandlung des Prozesses in der Kanonistik des 12. Jahrhunderts," in *Festschrift Eduard Eichmann zum 70. Geburtstag: Dargebracht von seinen Freunden und Schülern in Verbindung mit Wilhelm Laforet*, ed. Martin Grabmann and Karl Hofmann (Paderborn: Ferdinand Schöningh, 1940), 75–85, 90–92, 97 (demonstrating the influence of rhetoric on the *Perpendiculum* and the work of Sicard); Albert Lang, "Zur Entstehungsgeschichte der Brocardasammlungen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 31 (1942): 106–41 (demonstrating the dependence of the *Libellus disputatorius* on the *Perpendiculum* and ultimately on Sicard).
[129] See Hermann Kantorowicz, "The *quaestiones disputatae* of the Glossators," *Tijdschrift voor Rechtsgeschiedenis* 16 (1939): 17–31.
[130] Kantorowicz, "The *quaestiones disputatae*," 20–21 ("The disputations were destined for the practical training of future lawyers and judges […]. Therefore the problem had to be such that it could not be answered by memory and theoretical knowledge alone, but demanded dialectical skill, juristic discernment and creative imagination.").

notably the glossators Johannes Bassianus and Pillius, began to give the *quaestiones* a more practical orientation by drawing fact patterns directly from practice instead of relying on hypotheticals.[131]

4.4 Integrating Functionalist and Intellectual-Historical Explanations

This long discussion of the possible origins of the term *positio* provides some working material for a revised account of the emergence of the law of positions, one that integrates the functionalist analysis I have been pursuing throughout this dissertation with elements of the intellectual-historical analysis offered by Giuliani. On the one hand, our study of the word *positio* suggests that the idea for the new technique of proof was probably not adopted wholesale from Aristotle's *Topics* or from another text of the logical and rhetorical traditions. It is instead much more likely that the technique was first worked out in the legal practice of Tuscan and other Italian communes,[132] and that lawyers began to use the term *positio* only several decades after the first commune had begun to take the new approach to proof. On the other hand, the adoption of the term *positio* suggests that once the new technique of proof had been devised, lawyers turned to familiar texts from the trivium for ideas with which they could conceptualize and refine what they were doing. This recourse to the trivium was selective, and it did not necessarily require profound knowledge of either rhetoric or logic. But the existence of at least some borrowing, within an intellectual atmosphere that was already infused with the rhetoric-derived idea of proof established by adversarial argument, is nonetheless undeniable.

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[131] See Cortese, *Il diritto nella storia medievale*, 2:153–59 (with earlier literature).

[132] Of course, the new technique arose in an intellectual environment that was already permeated with ideas from the rhetorical tradition. Consider, for example, the regular use in the Pisan sources discussed in chapter 2 of the rhetorically tinged word *intentio*, "intention," in the sense of a set of factual allegations that a party intends to prove in order to establish the factual foundation of his or her legal claim.

The treatment of positions in Tancredus's *Assiduis postulationibus* provides a good illustration of this process of borrowing. We have seen that Tancredus, like Bencivenne fifteen years before, draws heavily on Roman law for his conceptualization of both interrogatories or positions, which he largely assimilates to Roman *interrogationes in iure*, and the respondent's responses, which he largely assimilates to the Roman-law notion of confession. But unlike *Invocato Christi nomine*, *Assiduis postulationibus* also shows a few signs of possible influence from the trivium. The word *positio* itself is of course one sign. Another is an explicit reference to Boethius. Tancredus states without further elaboration that the principle prohibiting "negative" interrogatories and positions is "as Boethius says."[133] A third sign emerges from Tancredus's discussion of the norm barring any interrogatory or position that combines two more assertions of fact that could be separated. The norm is justified, he says, "by the principle that says that if the particular of something is false, the universal of that thing is likewise false."[134] This justification is likely an allusion to Boethius's *De syllogismo categorico*, one of the texts of the *Logica vetus* canon, which contains an extensive discussion in book 1 of the logic of universal and particular propositions.[135] Within that discussion, Boethius sets forth the principle that if a given particular (say, the proposition that "a certain person is just") is false, the correlative universal (in this example, the proposition that "every person is just") logically must also be

[133] Bergmann, "Tancredi Bononiensis Ordo," pt. 3, tit. 3, § 3, at 209 ("Qualiter sunt formandae interrogationes vel positiones, quaeritur. Respondeo, verbis affirmativis et non negativis, quoniam qui negat, nihil dicit, et negationum nullae sunt causae, ut dicit Boëthius, arg. Dig. [22.3.2] et Cod. [4.19.23 …].").
[134] Id. ("per regulam, quae dicit: cuius aliqua particularis est falsa, eius universalis est similiter falsa").
[135] See generally "An. Manl. Sev. Boetii De syllogismo categorico libri duo," in *PL* 64:799B–810B.

false. In Boethius's words, "if the particular propositions are false, the [corresponding] universal propositions will also be false."[136]

The real contribution of the trivium to the substance of the law may not have been quite as significant as these allusions suggest, however. None of the three "signs" that I just mentioned proves any deep knowledge of or dependence on the rhetorical and logical traditions. The word *positio*, as we have already seen, probably does not indicate that Tancredus and his contemporaries had mastered, or even encountered at second hand, the difficult material of Aristotle's *Topics*.

Similarly, the principle that interrogatories and positions must be formulated in affirmative, not negative terms does not imply a profound knowledge of logic. In fact, it is by no means clear that Tancredus drew the principle from Boethius at all. Tancredus's modern editor Friedrich Christian Bergmann suggested that the jurist was referring to a passage of Boethius's *De differentiis topicis* in which the philosopher writes that "if a person is called into court, and no action or statement is put in issue, there can be no case."[137] But arguably more closely related passages can be found in legal sources, including in the *Code*, the *Decretum*, a decretal of Pope Innocent III, and in glosses of the glossators and decretists.[138] Most pertinent, the emperors Diocletian and Maximian can be taken to imply that a party bearing the burden of proof may not attempt to prove a negative assertion when they explain

[136] Id. at 64:801C ("[S]i particulares falsae fuerint, falsae erunt etiam universales. Nam si particularis quidam homo justus est falsa fuerit, universalis etiam omnis homo justus est falsa erit.").
[137] See Bergmann, "Tancredi Bononiensis Ordo," 209n22 ("[L]ib. 4 de different. top. 'si persona in iudicium vocatur, neque factum dictumve ullum reprehenditur causa esse non poterit.' ").
[138] For references, see Yves Mausen, "*Per rerum naturam factum negantis probatio nulla sit*: Le problème de la preuve négative chez les glossateurs," in *Mélanges en l'honneur d'Anne Lefebvre-Teillard* (Paris: Éditions Panthéon-Assas, 2009), 696–97.

in an imperial constitution found in the *Code* that "in the nature of things proof is not [the task] of the person who is denying a fact."[139] The idea of a prohibition on negative proof thus could easily have become current in legal thought by other means. Tancredus's explicit reference to Boethius may indicate nothing more than the jurist's desire to dress his text with allusions to the liberal arts.

Finally, Tancredus's distinction between "universals" and "particulars," although probably alluding to Boethius's *De syllogismo categorico*, shares little else in common with the universal/particular distinction in Boethian logic. A universal in Boethius's understanding must be, among other things, a property that is common to several particular examples.[140] For example, if I have two daughters, Anne and Margaret, "daughter" or "child" is the universal that is common to the particulars "Anne" and "Margaret." Neither of the example positions that Tancredus mentions in this connection is a "universal" as that term is understood by Boethian logic. Both the well-formed position, "You ate today," and the badly formed position, "You ate today in the church," are asserting "particular" facts about today, not universals. Instead, Tancredus seems to borrow Boethius's universal/particular distinction simply to explain why a respondent is entitled to deny the truth of an entire proposition containing multiple "particular" factual elements, some of which are true and others of which are false. If one of these "particular" elements is false, then the respondent can answer that the whole ("universal") proposition is false. This is a creative repurposing, or possibly a creative misunderstanding, of the distinction in logic.

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[139] Cod. 4.19.23 ("cum per rerum naturam factum negantis probatio nulla sit").
[140] See Peter King, "Boethius's Anti-Realist Arguments," in *Oxford Studies in Ancient Philosophy*, ed. Michael Frede et al. (Oxford: Oxford Univ. Press, 2011), 6 (with substantial further qualifications).

The influence from the liberal arts is somewhat stronger, although still difficult to assess, in the two monographs on positions that we have studied, *Cum frequens et cotidianus* and *Positiones succedunt in locum probationum*. To use *Cum frequens et cotidianus* as an example for both texts: several principles of admissibility appear at first sight to be candidates for rhetorical or especially logical influence. There are the categories already found in *Invocato Christi nomine*, *Assiduis postulationibus*, or both: any "superfluous" (*superflua*) position, "multipart" (*multiplex*) position, or "negative" (*negativa*) position. Several categories that are new in *Cum frequens et cotidianus* also give cause for reasonable suspicion: any "irrelevant" (*impertinens ad negocium*, *impertinens ad causam*) position, "obscure" (*obscura*) position, position that is too general (*in genere generalissimo*), or position containing "cavils" (*cauillacion*[*es*]).

It is not difficult to find echoes of these norms in thirteenth-century texts from the liberal arts. The example of book 8 of Aristotle's *Topics*, which described the rules of a structured exercise in dialectical disputation, inspired thirteenth-century writers on logic to elaborate formal norms of disputation for different forms of dialectical argument used in university education. Such texts are to my knowledge nowhere to be found in northern Italy, where law, not logic or theology, remained the dominant university discipline in the first half of the thirteenth century. But they are not difficult to find in northern Europe.

Echoes of Roffredus's norms of admissibility barring "superfluous," "obscure," and "cavil[ing]" positions can be detected, for example, in the educational treatise *De eruditione filiorum nobilium* ("On the Education of Noble Sons"), composed by the Dominican friar

Vincent of Beauvais in France in the second half of the 1240s.[141] Vincent offers a synopsis of the more formalized, Aristotle-influenced style of dialectical disputation. He states several rules of engagement. The party arguing in favor of the problem or thesis for discussion must limit himself to asking only those questions, and offering only those proofs, that are strictly necessary to make his case. "The opponent" (i.e., the party arguing in favor), he explains, "must first of all avoid posing unnecessary questions" and "avoid superfluous proofs of matters that are apparent."[142] Vincent also warns against putting forward "obscure propositions," making "false and unlikely assumptions," and drawing "misleading conclusions."[143] He urges particular caution in theological disputations, where the risk of impious sophistication is especially high: "in theological disputes one must avoid the subtle reasoning of philosophers and the biased reasoning of orators."[144] Over and above these formal rules, Vincent stresses the need for "limitation or moderation" in dialectical argument.[145]

An echo of Roffredus's norm against irrelevant positions can be detected, meanwhile, in a special, new genre of thirteenth-century logic, the treatise *de obligationibus* ("on obligations"). The precise origins of obligations are unclear. Precursors may date as far back as the second half of the twelfth century, although the development of an independent genre

[141] See Vincent of Beauvais, *De eruditione filiorum nobilium*, ed. Arpad Steiner (Cambridge, Mass.: Mediaeval Academy of America, 1938), xv (dating text to c. 1245–49).
[142] Id., cap. 22, at 75 ("Cauere debet opponens primo quidem, ne proponat inutiles questiones. […] Iterum cauere debet superfluas rerum apertarum probaciones.").
[143] Id. at 76 ("Iterum obscuras proposiciones. […] Item falsas et improbabiles assumpciones. […] Item sophisticas conclusiones […].").
[144] Id. ("Item in diuinis cauere oportet subtiles philosophorum et fucatas oratorum raciones.").
[145] E.g., id., cap. 20, at 70 ("In hoc exercicio tria sunt necessaria, sc. recta disputancium intencio et ordo et modus siue moderacio.").

of text seems to begin only in the thirteenth century.[146] But by the late thirteenth century, the developed form of the genre describes several types of dialectical argument.[147] One type of argument *de obligationibus*, with the familiar name *positio*, bears at least a slight resemblance to the law of positions. *Positio* is a dialectical argument in which an "opponent" (*opponens*) posits (*ponit*) some thesis statement, the *positum*. The respondent (*respondens*) must either concede or deny the statement, conceding if the statement is logically possible, denying if the statement is logically impossible. If the statement is conceded, the opponent then proceeds to posit a series of further propositions (*proposita*). The respondent must concede each new proposition if it is "sequentially relevant" (*pertinens sequens*), meaning that the proposition follows logically from the initial thesis statement and all previous propositions that the respondent has already conceded. If the proposition is relevant but "incompatible" (*pertinens repugnans*), meaning that the opposite of the proposition follows logically from the thesis statement and all previous propositions, or if the proposition is "irrelevant" (*impertinens*), meaning that neither the proposition nor its opposite follows logically from the thesis and all earlier propositions, the new proposition is inadmissible and must be denied by the respondent. The disputation ends either when the respondent has conceded all of the propositions that the opponent wished to offer or when a time limit has been reached.

These examples make clear that it is possible to draw approximate parallels between the main norms of admissibility in *Cum frequens et cotidianus* and major mid- to late

[146] See Eleonore Stump, "Obligations: From the Beginning to the Early Fourteenth Century," in *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600*, ed. Norman Kretzmann et al. (Cambridge: Cambridge Univ. Press, 1982), 315–17.
[147] For this account see Paul Vincent Spade, "Opposing and Responding: A New Look at *positio*," *Medioevo: Rivista di storia della filosofia medievale* 19 (1993): 236–37.

thirteenth-century texts on dialectical disputation. But possible does not mean necessary. It is much more difficult to demonstrate that the liberal arts were in fact the source of inspiration for the new norms of admissibility in law. The difficulty stems not only from the absence of early thirteenth-century treatments of disputation from northern or central Italy. It stems also from the problem that Roffredus's admissibility norms often have at least arguable alternative sources in the *Corpus iuris* or in the *Decretum*.

The norm in *Cum frequens et cotidianus* that prohibits admission of any "irrelevant" (*impertinens*) position provides an illustration of the difficulty. On the one hand, the word *impertinens* itself appears nowhere in the *Code*, the *Digest*, or the *Institutes* of Roman law, or in the *Decretum* or *Liber Extra* of canon law, whereas forms of the word *can* be found, for example, in the logical literature on obligations from the later thirteenth century, as we just saw. On the other hand, forms of the cognate Latin verb *pertineo* ("to belong, to pertain to") are common in all of the legal sources. In the *Digest*, *pertineo* makes an appearance only once in the title specifically devoted to proof (Dig. 22.3, *de probationibus*), and there only to speak of property that "belongs" to someone.[148] But the Roman jurists also frequently use forms of *pertineo* to put aside considerations that are not legally relevant to the issues under examination. A passage of the jurist Papinian discussing the payment of certain special municipal levies (*munera*) explains, for example, that "[a] freedman is not excused from civic *munera* on account of his patron [i.e., the freedman's former master], nor is it relevant to the matter (*nec ad rem pertinet*) whether he is tendering services to his patron or aid to a person

[148] See Dig. 22.3.23 ("Ante omnia probandum est, quod inter agentem et debitorem convenit, ut pignori hypothecaeve sit: sed et si hoc probet actor, illud quoque implere debet rem pertinere ad debitorem eo tempore quo convenit de pignore, aut cuius voluntate hypotheca data sit.").

who is deprived of eyesight."[149] A similar use of the phrase appears in a passage discussing the law of servitudes for channeling water across another person's real property. The jurist Paul holds that the servitude runs with the land to subsequent owners even if the contract of sale by which the servitude was originally created implies that the right is personal to the vendee: "When a servitude of channeling water was imposed on one of two estates which a seller retained on the sale of the other, the servitude thus acquired for the estate which was purchased passes with it on any subsequent sale of that estate; nor is it relevant in this context (*nec ad rem pertinet*) that a stipulation in which it was agreed to undertake to pay a penalty referred to the seller by name in providing for the case of his being prevented from enjoying his right."[150] These examples could easily be multiplied.[151] The essential point is that our sources provide no clear answer about the origin of the rule of relevance. The legal sources do not set forth explicit principles of admissibility or use the word *impertinens*, but they use forms of the congener *pertineo* specifically to discuss what we could call legal irrelevance.

Similar uncertainty attends a search for sources of inspiration of the norm against "superfluous" positions. On the one hand, sources in the trivium could theoretically have served as direct or indirect models for the Italian jurists. I am unable to find a relevant use of a form of the Latin *superfluus* or *supervacuus* in the *Logica vetus* or in most of the texts commonly relied on for knowledge of rhetoric, including Cicero's *De inventione*, *Rhetorica ad Herennium*, and Cassiodorus's *Institutes*. But an at least remotely relevant use of

[149] Dig. 50.1.17 pr. ("Libertus propter patronum a civilibus muneribus non excusatur, nec ad rem pertinet, an operas patrono vel ministerium capto luminibus exhibeat.").
[150] Dig. 8.3.36 ("Cum fundo, quem ex duobus retinuit venditor, aquae ducendae servitus imposita sit, empto praedio quaesita servitus distractum denuo praedium sequitur: nec ad rem pertinet, quod stipulatio, qua poenam promitti placuit, ad personam emptoris, si ei forte frui non licuisset, relata est."); translation from Alan Watson, ed., *The Digest of Justinian*, vol. 2 (Philadelphia: Univ. of Pennsylvania Press, 1985), ad Dig. 8.3.36.
[151] Further examples from the *Digest* are collected in *Vocabularium iurisprudentiae Romanae*, vol. 2, fasc. 2 (Berlin: Georg Reimer, 1913), v. "pertineo, -ere," para. (I)(1).

superfluus can be found in the section on rhetoric of Martianus Capella's *De nuptiis Philologiae et Mercurii*.[152] And Vincent of Beauvais, as we saw, proscribed "unnecessary questions" and "superfluous proofs" in his treatment of dialectical disputation from the 1240s. On the other hand, there is also some authority in the *Corpus iuris* for a prohibition on unnecessary proofs. In the title of the *Digest* devoted to proof by witnesses (Dig. 22.5, *de testibus*), the jurist Arcadius Charisius reports that the number of witnesses allowed to be called in a given proceeding is limited by imperial legislation to the number that the judge finds sufficient, "lest when the power [to call witnesses] is unbridled a superfluous multitude of witnesses be brought out for vexing people."[153]

Even norms of admissibility that seem most obviously to exhibit a medieval, rather than classical, linguistic style cannot invariably be assigned a source in twelfth- or thirteenth-century logic. On one hand, Roffredus's norm excluding any position that refers to a general category rather than a specific fact pattern (positions *in genere generalissimo*) is likely inspired by Boethian logic. The notion of overly general proof or argument has no obvious source in the *Corpus iuris*. The only passage cited in the Bologna manuscript of *Cum frequens et cotidianus* is only remotely connected to the issue of generality of proof.[154] The turn of phrase *in genere generalissimo* is instead almost certainly drawn from the *Logica vetus*, where Boethius's commentary on the *Isagoge* of Porphyry uses the term *genus*

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[152] Martianus Capella calls further legal proceedings "superfluous" when the defendant in a case has confessed to the fact in issue. See Mart. Cap. 449 ("Ceterum si negato facto fuerit lex uel quaeuis scriptura recitata, superflua uidebitur contentio, quando non iuris, sed ueritatis altercatio contineat quaestionem. Hoc uitio plerique falsi sunt.").
[153] Dig. 22.5.1.2 ("[E]x constitutionibus principum haec licentia ad sufficientem numerum testium coartatur, ut iudices moderentur et eum solum numerum testium, quem necessarium esse putaverint, evocari patiantur, ne effrenata potestate ad vexandos homines superflua multitudo testium protrahatur.").
[154] See Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fol. 104ra (citing Dig. 23.3.69.4).

generalissimum to mean the Aristotelian concept of "substance."[155] On the other hand, Roffredus's norm prohibiting positions that contain "cavils" (*cauillacion*[*es*]), a word that seems so typical of medieval logical disputation, could well have been modeled on passages in the *Corpus iuris*. The Latin word *cavillatio* is defined no less than three times in fragments of three separate Roman jurists in the last book of the *Digest*. The jurist Gaius uses the term *cavillatio* to designate litigant behavior that "vex[es] others by fraud and deception."[156] For Ulpian and Julian, a person is guilty of *cavillatio* when "a disputation is diverted through very small changes from what is obviously true to what is obviously false."[157]

Finally, in addition to these categories of mostly uncertain intellectual provenance, there are a certain number of categories of inadmissible position in *Cum frequens et cotidianus* that are undoubtedly drawn from legal, not logical sources. The legal origins of these categories are betrayed by their clear borrowing from the *Digest*. One example is Roffredus's category of position that may be excluded if the judge determines after a "summary hearing" that it is not "really in the interest of the person who is positing [the position] that an answer should be given."[158] Here Roffredus is borrowing language directly

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[155] See, e.g., "An. Manl. Sev. Boetii Commentaria in Porphyrium a se translatum," in *PL* 64:104A ("[Q]uidem substantia generalissimum dicitur genus, quoniam praeposita est omnibus, nulli vero ipsa supponitur […].").
[156] Dig. 50.16.233 pr. (" 'Si calvitur': et moretur et frustretur. Inde et calumniatores appellati sunt, quia per fraudem et frustrationem alios vexarent litibus: inde et cavillatio dicta est.").
[157] Dig. 50.16.177 ("Natura cavillationis, quam Graeci σωρίτην appellaverunt, haec est, ut ab evidenter veris per brevissimas mutationes disputatio ad ea, quae evidenter falsa sunt, perducatur."); Dig. 50.17.65 ("Ea est natura cavillationis, quam Graeci σωρίτην appellant, ut ab evidenter veris per brevissimas mutationes disputatio ad ea, quae evidenter falsa sunt, perducatur.").
[158] Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fol. 103vb ("utrum ualde intersit eius qui ponit quod respondeatur, in qua re habet locum summaria cognitio").

from the passage of the *Digest* that he cites for this category.[159] A similar example is provided by Roffredus's category of positions that are inadmissible because they are properly directed against third parties rather than respondents. Here too, there is a close correspondence between between the category in *Cum frequens et cotidianus* and the passage of the *Digest* that Roffredus cites.[160]

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It is difficult to draw firm conclusions about the origins of the law of positions from such uncertainty. A few things seem clear, however.

First, functionalist and intellectual-historical accounts of the law both help us understand the emergence of the law of positions.

A functionalist account helps us see the background conditions: the problem of insufficiency of proof that is perceptible in the writings of the jurists and to some extent in twelfth-century practice; and the use of the party as a source of proof, obtained initially by questioning from the adjudicator, but ultimately by party-controlled questioning. This transfer of a measure of control over procedural action from the adjudicator to the party bearing the burden of proof represented a tradeoff. It enabled courts and arbitral panels to benefit from parties' superior knowledge about their disputes and thus their superior capacity to frame lines of inquiry for one another. But it did so at the cost of empowering parties to abuse their

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[159] Cf. Dig. 11.1.9.6 ("Summatim igitur praetor cognoscere debebit, cum quaeratur, an quis respondere debeat quo iure heres sit, ut, si valde interesse compererit, plenius responderi iubeat.").

[160] Compare Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fol. 103vb ("Quarto an id ponatur adtendendum est ad quod non ipse contra quem fit posicio, set alius respondere tenetur, ut ff. de interrogatoriis actionibus l. si sine § alius [Dig. 11.1.9.3]."), with Dig. 11.1.9.3 ("Alius pro alio non debet respondere cogi, an heres sit: de se enim debet quis in iudicio interrogari, hoc est cum ipse convenitur.").

opponents and to pursue fact finding that did not serve adjudicators' actual informational needs. Under these conditions some form of doctrinal elaboration regulating the relationships of parties to one another and parties to adjudicators was probably inevitable.

An intellectual-historical account helps us understand why, given these background conditions, the jurists formulated the resulting doctrine in the particular terms that they did. The resulting doctrine, set forth in *Invocato Christi nomine*, was initially entirely reliant on existing concepts of Roman law. But almost immediately thereafter, we find signs of borrowing from the rhetorical and logical traditions of the trivium, as the jurists sought intellectual tools with which to define and refine the new area of law.

Second, the fact of this borrowing from the trivium fits into two broader patterns of late twelfth- and thirteenth-century intellectual culture. At the turn of the thirteenth century, the appearance of the word *positio* itself points to possible influence from the tradition of rhetoric, reflecting a broader turn-of-the-century trend of juristic interest in techniques of practical rhetorical argument. In the late 1230s and early 1240s, the systematic elaboration of principles of admissibility reflects the influence of a broader thirteenth-century trend in logic toward the formulation of formal norms of dialectical disputation.

Finally, the extent of the borrowing should not be overstated. The basic structure of the law of interrogatories and positions, relying on concepts of Roman law, was already in place before the first clear borrowings can be detected. There are few convincing cases of borrowing from the trivium: the inadmissible categories of positions *in genere generalissimo* and "multipart" positions; perhaps a few others. When such borrowing can be detected, it is limited to the area of admissibility, and it is invariably from the relatively elementary texts of the *Logica vetus*, not the more sophisticated Aristotelian texts of the *Logica nova*. There is in

particular no clear evidence of borrowing from the *Topics* of Aristotle. Probably the most we can say is that as the jurists sought to respond in the early thirteenth century to the pressures exerted on respondents by the new law of positions, they drew ideas for most rules from Roman law and for a few rules from the *Logica nova*; but they also likely drew inspiration from the general notion of admissibility that could be found in the textual tradition surrounding Aristotle's *Topics*. In this last respect, Giuliani's intellectual-historical account of the law of positions remains correct.

5. CONCLUSION

In this third chapter I have sought to characterize (parts 2 and 3) and explain (part 4) the doctrine of positions that emerged from the turn of the thirteenth century through about midcentury. I have used four texts as my main sources: *Invocato Christi nomine*, *Assiduis postulationibus*, *Cum frequens et cotidianus*, and *Positiones succedunt in locum probationum*. The central theme of this chapter is that the doctrine responds to two functional "needs" precipitated by the introduction of the technique of interrogatories and positions. One is the need to protect parties from abusive questioning by the opponents. The other is the need to mediate between the fact production of parties and the informational requirements of adjudicators. The particular form that this new doctrine took, however, was the product of selective borrowing, initially from Roman law, and later from both Roman law and the rhetorical and logical traditions of the trivium.

In the next chapter I will test the conclusions reached here against a comparative case: the principles of admissibility that arose in a different area of Roman-canon proof, the law of witnesses.

CHAPTER 4

ADMISSIBILITY IN THE LAW OF WITNESSES

1. INTRODUCTION

In the preceding three chapters I have given an account of the emergence of rules of admissibility in one area of twelfth- and thirteenth-century Roman-canon procedure: the law of positions. I have argued that late twelfth- and early thirteenth-century practice partly shifted the power to examine parties from adjudicators to opposing parties; that the new technique of proof that resulted from this shift, initially called "interrogatories" and later generally called "positions," provoked a doctrinal response in the early to mid-thirteenth century in the form of norms of admissibility regulating which positions an opposing party was required to answer; and that some of these norms likely served objectives of protection and coordination: protecting parties from abusive questioning by their opponents and coordinating more closely the parties' production of proof with the informational needs of the fact finder.

In this final chapter I turn for comparison to the other main area of twelfth- and thirteenth-century Roman-canon procedure in which principles of admissibility appear: the law of witnesses. My theme is that a shift analogous to the shift that gave rise to the law of positions also took place in the late twelfth- and thirteenth-century law of witnesses. Power to examine witnesses was partly shifted from adjudicators to parties. And here again, the doctrinal response of the jurists was to formulate norms of admissibility. Like the norms governing positions, these norms aimed in part at protection of witnesses from abusive questioning, but in part also at fact-finding efficiency.

In what follows I first describe, in section 2, what I consider to be the main means of regulating witness testimony in the second half of the twelfth century: rules of witness qualification and a nascent rule of proof sufficiency requiring the testimony of at least two witnesses.[1] I next discuss, in section 3, several possible accounts for the shape of this area of law, suggesting that both the textual influence of the *Corpus iuris* and *Decretum* and the structure of witness examination, in particular the control of the examination by the court and the absence of the parties from the examination room, offer plausible explanations of the doctrine. In section 4 I then identify a gradual formalization of a new trial practice in the late twelfth and thirteenth centuries in which the court conceded some control over witness examination to the parties by allowing the parties to formulate questions for the witnesses. I associate this new practice with another new development in the thirteenth century, namely the emergence of basic principles of admissibility regulating the questions that could be put to the witnesses. I conclude briefly in section 5.

2. THE LAW OF WITNESSES IN THE TWELFTH-CENTURY *ORDINES*: QUALIFICATION AND SUFFICIENCY

The twelfth-century lawyers, whether legist or canonist, saw proof by witnesses as one of the central elements of the law of procedure. Indeed, there was general agreement that witness testimony was the preferred source of factual proof. The reason was given by—

[1] In section 2 I do not intend to give an exhaustive treatment of the doctrine in this area of procedure. I intend rather to provide only so much detail as is necessary to sketch out the main contours of the law and to show the direction of historical change in the late twelfth and early to mid-thirteenth centuries. The doctrine in all areas of the law of witnesses from the twelfth to the fourteenth century is set forth comprehensively in Yves Mausen, Veritatis adiutor*: La procédure du témoignage dans le droit savant et la pratique française (XIIe–XIVe siècles)* (Milan: Giuffrè, 2006). For historical analysis, concentrating on Bartolus, see also Susanne Lepsius, *Von Zweifeln zur Überzeugung: Der Zeugenbeweis im gelehrten Recht ausgehend von der Abhandlung des Bartolus von Sassoferrato* (Frankfurt am Main: Klostermann, 2003).

among others—the British canonist author of the procedural manual *Summa Olim*, who expresses an early version of the principle that would live on in Continental law as the maxim *témoins passent lettres*. "The first, [and] a frequent type of proof is witness testimony." This is because, he explains, "The live voice of witnesses is worthier than the dead voice of written instruments."[2]

The importance of witness testimony was such that a few canon lawyers went so far as to assert at least in passing that witness testimony was not only "worthier" than other means of proof, but required in all cases. These canonists relied on a canon of the *Decretum* that required the presence at trial of "four persons […]: chosen judges, appropriate accusers, suitable defenders, and lawful witnesses."[3] The author of *Iudicandi formam in utroque iure*, an *ordo iudiciarius* thought to have been composed in mid-1170s Westphalia, restates this principle: "For [the *Decretum*] says: in every proceeding it is necessary that there be four persons: judges, accusers, defendants, and witnesses. Thus more than just three persons are necessary in a proceeding."[4] In the exorbitant metaphor of one procedural manual from the 1180s, *Quia iudiciorum quedam sunt preparatoria*, the trial witness, bearing "the war trumpet of truth" (*tuba veritatis*), is one of the necessary participants in a judicial proceeding

[2] Giovanni Tamassia and Giovanni Battista Palmieri, eds., "Iohannis Bassiani Libellus de ordine judiciorum (ex cod. ms. Bibliothecae publicae Patavinae n. 1475)," in *Bibliotheca iuridica medii aevi*, ed. Augusto Gaudenzi, vol. 2 (Bologna, 1892), § 375, at 236a ("[D]ignior est vox viva testium quam vox mortua instrumentorum.").
[3] C. 4 q. 4 c. 1 ("[I]n omni iudicio quattuor personas necesse est semper adesse; idest iudices electos, accusatores idoneos, defensores, congruos, atque testes legitimos.").
[4] Linda Fowler-Magerl, ed., "Iudicandi formam," in Ordo iudiciorum vel ordo iudiciarius*: Begriff und Literaturgattung* (Frankfurt am Main: Klostermann, 1984), 273 ("Ait enim: in omni iudicio necesse est quatuor personas esse, iudices, accusatores, reos, ac testes, non ergo tres sole necessarie sunt in iudicio.").

alongside "the judge, equipped with the helmet of justice; the plaintiff, with the dagger of spite;" and "the defendant," armed with "the shield of defense."[5]

The legists, for their part, seem not to have gone so far as to say that witness testimony was essential to every trial, although they agreed with the canon lawyers about the overriding importance of witness testimony for trials. The Bolognese legist procedural manual *Propositum presentis operis*, composed sometime in the period 1167–81, adopts this position expressly: "A judicial proceeding […] is nothing other than an action at law undertaken by three persons, namely, the judge, the plaintiff, and the defendant. For although witnesses are of course quite often necessary in judicial proceedings, it is nonetheless possible to have a proceeding without them."[6] Legists also confirmed the "worthier" or "more dignified" status of witness testimony vis-à-vis documentary proof. The author of the manual *Invocato Christi nomine*, writing at the end of the twelfth century, restates the standard opinion that "there are two main types of proof, namely witness testimony and written instruments, and proof by witness testimony is of greater dignity than proof by instruments."[7]

In light of such a decided preference for witness testimony, it is hardly surprising that discussion of the law of witnesses appears in almost every twelfth-century *ordo iudiciorum*

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[5] Johann Friedrich Ritter von Schulte, ed., "Der *ordo iudiciarius* des Codex Bambergensis P. I. 11.," *Sitzungsberichte der philosophisch-historischen Classe der Kaiserlichen Akademie der Wissenschaften* 70 (1872): 316 ("Praeterea in omni iudicio quatuor personas necesse est esse: iudicem armatum galea iustitiae, actorem pugione malitiae, testem tuba veritatis, reum clypeo defensionis, ut IV. q. 3. c. 1 et 2.").

[6] Tamassia and Palmieri, "Iohannis Bassiani Libellus," § 2, at 213a ("Iudicium vero nihil aliud est quam actus legitimus trium personarum, scilicet iudicis, actoris et rei. Nam testes, licet plurimum in iudiciis utpote necessarii producantur, et sine his tamen potest esse iudicium.").

[7] Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 5, fasc. 1, *Der* ordo *"Invocato Christi nomine"* (Heidelberg: Winter, 1931), pt. 4, tit. 43 (*de testibus*), at 93 ("[P]robationis due sunt species principaliter, videlicet testimonia et instrumenta, et dignior est probatio per testes quam per instrumenta […].").

and *ordo iudiciarius*.[8] What is perhaps initially more surprising is that the norms governing witnesses that one finds in these texts bear little formal resemblance to the norms governing positions. We have already seen that the law of positions, as it developed several decades later in the early thirteenth century, prescribed rules to determine the *admissibility* of individual factual questions or propositions. To formulate these rules of admissibility the jurists drew, as we saw in chapter 3, both on fragments of the *Corpus iuris* and on the principles of dialectic that were current in the thirteenth century. By contrast, the twelfth-century law of witnesses relied largely on other, structurally distinct mechanisms: on rules of witness *qualification and privilege*, which specified whether a given prospective witness was qualified to testify or, if qualified, could claim a privilege from testifying; and to a lesser extent on substantive rules of proof *sufficiency*, which specified the minimum quantum of testimonial proof that could serve as the basis for a definitive sentence.

2.1 **Qualification**[9]

Rules of witness qualification are pervasive in the twelfth-century procedural literature beginning with the earliest *ordines*. In his *Karissimo amico et domino A.*, dated to between 1123 and 1141, Bulgarus distinguishes among three categories of prospective witness. A person may be unwilling to testify but nonetheless compelled to do so, through compulsory process; he or she may be unwilling to testify and excused by the court; or he or she may be willing to testify but "repelled" from testifying. As grounds for excusal Bulgarus

[8] The only exceptions are those twelfth-century *ordines* that, because they are fragmentary or for some other reason, do not discuss proof at all: *Cum essem Mutine*, *Hactenus magister Gratianus egit de personis*, *Iuris scientia res quidem sanctissima est*, *Propositum presentis operis*, *Quicumque vult*, *Quoniam omnium legislatorum sollicita*, and *Videndum est igitur quid sit accusare*.

[9] For an exhaustive account of the twelfth- to fourteenth-century doctrine of grounds for disqualification ("reproches *in personas*"), see Mausen, Veritatis adiutor, 387–580. I use the term "qualification" in preference to "competency,"

expressly names old age and poor health. The elderly and infirm are excused from testifying, he says, "in all cases" (*in omnibus causis*). Other unspecified grounds may justify excusal in civil but not criminal proceedings; the jurist implies that kinship of some kind may be one such ground. Persons who are outright disqualified from testifying include children, if called to testify against their parents, and vice versa.[10]

In addition to drawing a distinction between grounds for excusal of an unwilling witness and grounds for disqualification of a willing witness, Bulgarus also differentiates between two modes of disqualification. Any witness may be disqualified "by the judge acting ex officio on account of suspicion of [the witness's] testimony" (*Judicis officio propter dicendi suspicionem* […].). But a witness may also be disqualified on the motion of a party who raises an exception alleging any ground for rejection given in the *leges* of the *Corpus iuris*. Here Bulgarus, instead of stating well-defined rules, simply sets forth general standards for evaluating the capacity of a witness: "The credibility, dignity, moral character, [and] seriousness of demeanor in witnesses must be examined" (*In testibus fides, dignitas, mores, gravitas examinanda est*.).[11]

Later legist *ordines* adopt similar analyses of the law of witness disqualification while adding greater rule-like specificity to some of Bulgarus's open-textured standards. The southern French procedural manual *Si quis de re quacumque*, produced between 1165 and about 1180, follows Bulgarus in distinguishing among those who are unwilling to testify and have reason to be excused, those who are unwilling to testify but are subject to compulsory process, and those who are willing to testify but disqualified. Unlike Bulgarus, the author lists

[10] Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 4, fasc. 1, *Excerpta legum edita a Bulgarino causidico* (Innsbruck: Wagner, 1925), 5.
[11] Id. at 5–6.

specific grounds for both excusal and disqualification: subject to excusal are the elderly, the infirm, bishops who are required to remain within their dioceses (*qui propter loci religionem inde se movere non possunt*), and public magistrates and soldiers on official business; children testifying against their parents, persons of bad fame, and ransomed captives are all disqualified.[12]

More elaborate treatments appear in *Quedam iudiciorum preparativa explanaturi* and *Inter cetera studiorum genera ars boni et equi*, two other legist *ordines* from southern France. Both texts adopt a schema developed by the glossator Rogerius, who likely spent part of his career teaching law in southern France, almost verbatim. Rogerius follows Bulgarus in distinguishing first between "willing" and "unwilling" prospective witnesses, then between willing witnesses who are qualified to testify and those who are disqualified, and between unwilling witnesses who may be excused from testifying and those who are subject to compulsory process. Rogerius's schema advances beyond earlier treatments of the subject, however, in that it defines a set number of abstract categories of person who are subject to excusal or disqualification instead of merely listing examples (e.g., *ut senes*, "such as old men"). Grounds for excusal, according to Rogerius and the two *ordines* that follow him, are old age (*ratione etatis, ut senex*), sickness (*racione morbi supervenientis*), and public office (*causa* […] *dignitatis*). Grounds for outright disqualification include sex (*ratione sexus*), young age (*ratione etatis, ut pupilli*), servile status (*ratione conditionis*), and past misconduct (*ratione delicti*), among others. Rogerius also alters Bulgarus's analysis of the means by which a person can be disqualified. Where Bulgarus had held that a person could be disqualified either on a party's motion or at the discretion of the court, Rogerius is stricter. A

[12] *Placentini iurisconsulti uetustissimi de uarietate actionum libri sex.* […] (Mainz, 1530), lib. 4, at 104.

prospective witness is disqualified automatically, *ipso iure*, if any of the specified grounds for disqualification applies, whether or not the opposing party has raised an exception. Moreover, even if none of the usual grounds for disqualification is present, the judge may still disqualify a person from testifying on a discretionary basis if the person strikes the judge as potentially biased or not credible.[13]

The doctrinal debates that these differing treatments imply must have remained at least partly unsettled among legist writers even at the very end of the twelfth century. The author of *Invocato Christi nomine*, writing during or shortly after 1198, draws the same distinction as earlier legists between excusal and disqualification, discussing many of the same grounds. He indicates, however, that certain problems of disqualification were still being actively debated. Thus the author points out that according to some jurists, a public officer holder is privileged from testifying if he is unwilling. According to others, an office holder is absolutely disqualified from testifying at all. Still others allow that an office holder may testify if willing to do so and if both parties consent.[14]

Similarly intensive treatment of the law governing witness qualification and privileges can be found in procedural writings of the twelfth-century canon lawyers. This is true even for the earliest examples of the genre. The *Rhetorica ecclesiastica*, a canonist text from northern Germany composed around 1160, already deals at length with witness qualification. Unlike the legists, the author of the *Rhetorica* does not distinguish between grounds for excusal and grounds for disqualification. Some of the preoccupations of the author seem,

[13] See Giovanni Battista Palmieri, ed., "Rogerii Summa Codicis," in *Scripta anecdota glossatorum*, 2nd ed., vol. 1 of *Bibliotheca iuridica medii aevi*, ed. Augusto Gaudenzi (Bologna: Ex aedibus Angeli Gandolphi, 1913), ad Cod. 4.20, at 110a–b. Cf. *Inter cetera studiorum genera ars boni et equi*, in London, British Library, MS Harley 3834, fols. 134v–135r; *Quedam iudiciorum preparativa explanaturi*, in Munich, Bayerische Staatsbibliothek, MS Clm 16084, fol. 71va–b.

[14] Wahrmund, *Quellen*, vol. 5.1, pt. 4, tit. 43 (*de testibus*), at 93–94.

moreover, specific to canon law. We find, for example, disqualification of "all persons who belong to any sect opposed to the Christian religion, such as gentiles and Jews" (*quicumque sunt alicuius sectae Christianae religioni oppositae, ut gentiles et iudaei*), as well as a bar on lay testimony given against clerics, clerical testimony against laymen, and testimony by clerics against those who are superior to them in the ecclesiastical hierarchy. The testimonial disqualification of women, which in the legist *ordines* reaches only testamentary causes, is extended in the *Rhetorica ecclesiastica*—in reliance on a canon of the Fifth Council of Carthage—to a total bar on all testimony given by women. Other categories of disqualification are more familiar, however. Like the legist *ordines iudiciorum*, the *Rhetorica ecclesiastica* disqualifies "all persons of bad fame, including stage actors, thieves, abductors, unchaste persons, adulterers, criminals, [and those] who patronize fortune tellers and soothsayers" (*omnes infames personae, ut ystriones, fures, latrones, raptores, incesti, adulteri, criminosi, qui veniunt ad sortilegos et divinatores*); also familiar is the *Rhetorica*'s disqualification of persons who are younger than fourteen, the minimum age of testimonial capacity.[15] Similar categories can be found in *Etiam testimonia removentur*, another canonist *ordo* from roughly the same period and region, but presented in a more abstract form; individual examples are condensed into the categories of "sex, condition, age, lifestyle, reputation, credibility" (*sexus, conditio, etas, vita, fama, fides*).[16] Another canonist *ordo*, this time from England, composed sometime between about 1140 and 1170, uses similar abstraction but with slightly different categories: "In witnesses credibility, seriousness, moral

[15] Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 1, fasc. 4, *Die "Rhetorica ecclesiastica"* (Innsbruck: Wagner, 1906), 71–73.
[16] Linda Fowler-Magerl, ed., "Fragmentarischer *ordo*," in Ordo iudiciorum, 264.

character, [and] rank should be examined. And therefore condition and wealth should be investigated in their persons […]."[17]

Ultimately, although a similar treatment of the law of disqualification is implied in a German procedural text from as late as the 1190s,[18] the canon lawyers chose to adopt some or all of the legists' schema. A distinction between excusal or privilege and disqualification appears in a French canonist *ordo* from after 1160, the *Tractaturi de iudiciis primo de preparatoriis iudiciorum*, and in later *ordines* from the 1180s and 1190s, including the Anglo-Norman canonist texts *Editio sine scriptis*, *Quia iudiciorum quedam preparatoria*, and *Summa Olim*.[19]

In addition to these principles of disqualification based on the status or character of a potential witness, a few twelfth-century proceduralists—all of them canonists—addressed whether a prospective witness could be disqualified for lack of firsthand knowledge of the relevant facts. Later civilian jurists elaborated rules restricting testimony *de auditu* that reached their most developed form in the sixteenth century and that bear significant resemblance to the common-law rule against hearsay.[20] In the twelfth century, no such rule

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[17] Gustav Hänel, ed., *Incerti auctoris ordo iudiciorum (Ulpianus de edendo)* (Leipzig, 1838), tit. *de testibus*, at 32.

[18] See Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 1, fasc. 5, *Der* ordo judiciarius *des Eilbert von Bremen* (Innsbruck: Wagner, 1906), 13 ("Exploranda fideque requisita rogitanda / Condicio, plebeius sive decurio seu sit / Liber homo seu sit servus, pauper locuplexve / Commendetque suam sua conversatio vitam.").

[19] See Carl Gross, ed., *Incerti auctoris ordo judiciarius, pars summae legum et tractatus de praescriptione: Nach einer Göttweiger (Stiftsbibliothek. saec. XII. ex.) und einer Wiener (Hofbibliothek. saec. XIII. ex.) Handschrift* (Innsbruck, 1870), tit. 12 (*de testibus*), §§ 5–6, at 117–18; Schulte, "Der *ordo iudiciarius*," tit. 15 (*de testibus*), at 308–10; Tamassia and Palmieri, "Iohannis Bassiani Libellus," §§ 375–86, at 236a–237a; Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 2, fasc. 3, *Die* summa de ordine iudiciario *des Ricardus Anglicus* (Innsbruck: Wagner, 1915), 42.

[20] See especially Mirjan Damaška, "Hearsay in Cinquecento Italy," in *Studi in onore di Vittorio Denti*, vol. 1, *Storia e metodologia: Garanzie e principi generali* (Milan: CEDAM,

had yet been properly elaborated. Yet a few canonists did raise the problem of determining when exactly a prospective witness could be said to "know" the facts of a case. As the French canonist author of *Tractaturi de iudiciis primo de preparatoriis iudiciorum* puts it, "Witnesses of fact are those who will say things that they know. For testimony *de auditu* is not admitted except in a matrimonial cause."[21] The author elaborates slightly on this rule later in the same title in a discussion of "how witnesses are to be admitted" (*quomodo admittendi sunt testes*). Here he explains that to be admitted witnesses "must swear that in the present matter they will say those things which they know." This oath, he implies, prohibits a person from testifying to what he has only *heard*; hearing, in this author's understanding, is not direct knowledge. "Indeed," he writes, "no one is admitted to testify on account of what he has heard."[22] But as before, the author suggests again that there are exceptions to this rule: a witness *de auditu* is allowed to testify, for example, "when a creditor admits in the presence of some people that a debt has been paid to him," and "likewise in a matrimonial cause."[23] A similar discussion appears in the canonist *Summa Olim*, where the author explains that a hearsay witness *may* testify to something having been done in time out of memory, *ut de*

1994), 59–89; see also Frank R. Herrmann, "The Establishment of a Rule against Hearsay in Romano-Canonical Procedure," *Virginia Journal of International Law* 36 (1995): 1–51.

[21] Gross, *Incerti auctoris ordo*, tit. 12 (*de testibus*), § 1, at 116 ("Testes facti sunt illi, qui in juditio ea, quae noverunt, dixerint. Non enim de auditu testimonium recipitur, nisi in causa matrimonii.").

[22] Id., § 9, at 119 ("Ob auditum vero nemo ad testimonium admittitur […].").

[23] Id. ("[…] quando creditor coram aliquibus fatetur sibi solutum esse debitum, illi post super hoc de solo auditu testimonium ferent. Similiter in causa matrimonii").

memoria.[24] A witness *de auditu* may also testify to having heard about the circumstances of a birth.[25]

The implicit rationale underlying these canonists' treatment of testimony *de auditu* is essentially the same as the usual rationale for the modern common-law rule against hearsay: the direct testimony of a witness is superior to testimony reporting an utterance secondhand.[26] The rule acknowledges circumstances in which testimony *de auditu* is appropriate, however, either because the thing heard was a verbal act, as in the case of the creditor's statement discharging a debtor from his debt, rather than merely the assertion of the existence of some fact, or because superior evidence might well be impossible to obtain, as in a matrimonial case involving proof of the degrees of consanguinity or affinity of the married parties. But whatever the precise contours of this inchoate rule, it is clear that like the status-based disqualification rules, the rule against witnesses *de auditu* similarly takes the form of a rule of witness competency, not a rule addressing individual questions of the witness examiner or answers given by the witness.

Thus however much the treatment of disqualification varied from author to author and between legists and canonists, the central significance of witness qualification within the procedural manuals remained a constant throughout the second half of the twelfth century. By the end of the century the canon and Roman lawyers had converged onto the same broad lines

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[24] Tamassia and Palmieri, "Iohannis Bassiani Libellus," § 405, at 237a ("Itemque cum contenditur an opus factum sit, ut de memoria, auditus operis facti tantum licet factum non viderit testifichetur, ut [Dig. 39.3.2.7].").

[25] Id., § 406, at 237b ("Sed et in causa nativitatis sufficit testimonium de auditu, ut [C. 35 q. 6 c. 8].").

[26] Mirjan Damaška has suggested that the prohibition on testimony *de auditu* reflects a preference for direct sensory perception that has its immediate origin in eleventh-century confession practice and its ultimate roots in Aristotelian epistemology. See Damaška, "Hearsay in Cinquecento Italy," 62–63, 65–66.

of the law of disqualification and privilege, althought the canon lawyers had also begun to elaborate a rule barring witnesses *de auditu* for which there was no legist equivalent.

Moreover, witness qualification rules, in one form or another, must also have been regularly applied in twelfth-century judicial practice. In Pisa, for example, qualification rules for the communal courts were enacted into the city's late twelfth-century body of statute law, the *Constituta legis et usus*.[27] In the communes of Genoa and Savona, to take just two examples among many, notarial cartularies recording the definitive sentences of consular courts periodically note that the fact finders reached their decision with proof "by suitable witnesses" (*idoneis testibus*, *per idoneos testes*).[28] The very word *idoneus*, 'suitable', implies that some determination of the qualifications of the witnesses must have taken place during the proceeding, even if the exact rules or standards applied are not known. Outside the courts of northern Italy, meanwhile, the text *Nunc primo nobis adversarius*, an early formulary composed in England or Scotland after 1153, implies that some discussion of the qualification of witnesses took place in ecclesiastical proceedings as part of a party's offer of proof. The form for offering proof transmitted in one version of the formulary includes the boilerplate language, "We [i.e., the party bearing the burden of proof] are prepared to lend clear credibility to those things which we are alleging by means of both the statements of written instruments and the evidence of suitable witnesses [*idoneorum testium*] who are of

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[27] See Paola Vignoli, ed., *I Costituti della legge e dell'uso di Pisa (sec. XII): Edizione critica integrale del testo tràdito dal "Codice Yale" (ms. Beinecke Library 415)* (Rome: Istituto storico italiano per il medio evo, 2003), 30–31 (rules in the *Constitutum legis*), 182–83 (rules in the *Constitutum usus*).

[28] See, e.g., Laura Balletto et al., eds., *Il cartulario di Arnaldo Cumano e Giovanni di Donato (Savona, 1178–1188)* (Rome: Ministero per i beni culturali e ambientali, 1978), no. 119, at 2:62 (1178 dic. 23; "per tres idoneos testes"); Mario Chiaudano, ed., *Oberto Scriba de Mercato (1186)* (Genoa: R. deputazione di storia patria per la Liguria, 1940), no. 274, at 102–3 (1186 nov. 18; "idoneis testibus"); Mario Chiaudano and Raimondo Morozzo della Rocca, eds., *Oberto Scriba de Mercato (1190)* (Genoa: R. deputazione di storia patria per la Liguria, 1938), no. 189, at 76 (1190 feb. 27; "suficienter bonis et idoneis testibus probavit").

praiseworthy life, cheerful reputation, and well-considered piety and who are ready to put their due regard for judicial duty before every form of favor and power."[29]

2.2 **Sufficiency**[30]

In addition to qualification rules, several twelfth-century *ordines* discuss a second, less direct means of witness control: a principle of proof sufficiency, summed up in the later maxim *testis unus, testis nullus*, requiring that testimony of a single witness be corroborated either by the testimony of a second witness or by proof of some other kind. Such a principle is admittedly not part of the law of procedure as that term is understood in modern law, but a part of the substantive law, since it specifies the quantum of proof required to establish a claim, not the manner in which the claim is to be proved. Yet the writers of the *ordines* evidently saw *testis unus, testis nullus* as intrinsically linked to procedure, as they generally discuss the principle in the titles *de testibus* of their procedural manuals. Indeed, the two types of rule—witness disqualification and proof sufficiency—can both be understood as limitations on the use of testimony by witnesses viewed by either the judge or the opposing party as not fully credible. In this respect, the functional difference between the two types is simply that rules of witness disqualification are in principle applicable ex ante,[31] before the

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[29] Hänel, *Incertis auctoris ordo*, 55 ("(H)is, quae allegamus parati sumus fidem adhibere dilucidam tam iudictis instrumentorum quam documentis idoneorum testium vitae probabilis, famae hilaris, perpensae pietatis, qui parati sunt praeponere omni gratiae et potentatui fidem debitam iudiciariae religioni.").

[30] The account in this section relies heavily on that of André Gouron, "*Testus unus, testis nullus* dans la doctrine juridique du XIIe siècle," in *Mediaeval Antiquity*, ed. Andries Welkenhuysen, Werner Verbeke, and Herman Braet (Louvain: Leuven Univ. Press, 1995), 83–93. See also the comprehensive discussion, covering the twelfth to fourteenth centuries, in Mausen, Veritatis adiutor, 681–708.

[31] The rules of qualification are ex ante rules only in principle, however. As some *ordines* suggest, disqualifications could also be deferred until after testimony had been taken. Such deferral would obviously have blunted, if not eliminated, the effect of the rules on the cognitive process of the fact finder. See, e.g., Linda Fowler-Magerl, ed., "Iudicium est trinus

taking of testimony, whereas rules of proof sufficiency are applicable ex post, after the party bearing the burden of proof has had an opportunity to present all of his or her proof.

The principle *testis unus, testis nullus* was not immediately adopted in the procedural literature. The earliest *ordo iudiciorum*, Bulgarus's *Karissimo amico et domino A.*, despite discussing witness qualification at some length, makes no mention of any rule that treats the testimony of a single witness as insufficient. But already by about 1160, several canon lawyers writing on procedure had accepted that proof by a minimum of two witnesses, if not an outright requirement in all cases, was at least a benchmark for a well-conducted judicial proceeding. The canonist author of the northern German *Rhetorica ecclesiastica* assembles a pastiche of authorities from Scripture to press the point:

> We are taught moreover by the Gospel, by the Old Testament, and by the writings of the Apostle that the testimony of two or three persons is sufficient to prove any case. For the Lord speaking to the Jews says: "It is also written in your law, that the testimony of two or three[32] men is true." […] The Apostle says to the Corinthians: "In the mouth of two or three witnesses shall every word be established," so that there should be no further hesitation about whether the witnesses are suitable. Likewise the Apostle to the Hebrews […].[33]

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personarum trium actus," in Ordo iudiciorum, 299; Friedrich Kunstmann, "Ueber den ältesten *ordo judiciarius* mit Rücksicht auf: *Magistri Ricardi Anglici ordo judiciarius ex codice Duacensi, olim Aquicinctino, nunc primum editus per Carolum Witte. Ictum Halensem.* Halis 1853. 4o S. 80 und X.," *Kritische Überschau der deutschen Gesetzgebung und Rechtswissenschaft* 2 (1855): 19 (*In principio de ordine iudiciario agitur*).

[32] The Vulgate text of John 8:17 in fact makes no mention of a third witness: "[E]t in lege vestra scriptum est quia duorum hominum testimonium verum est."

[33] Wahrmund, *Quellen*, 1.4:73–74 ("Quod autem ad omnem causam probandam sufficiens sit duorum vel trium testimonium, docemur tum ex evangelio tum ex veteri testamento tum ex apostolicis scriptis. […] Dominus enim loquens ad Iudaeos ait: in lege vestra scriptum est, quoniam testimonium duorum vel trium verum est. […] Apostolus ad Corinthos ait: in ore duorum vel trium testium stabit omne verbum, ut de quo non sit ambigendum ultra, scilicet si testes sint idonei. Item apostolus ad Hebraeos: […]" (quoting respectively Jn 8:17; 2 Cor 13:1; Heb. 10:28).).

The roughly contemporary canonist *ordo Etiam testimonia removentur* states the general principle more succinctly, and rigidly: "the voice of one witness alone is not admissible."[34] The author of *Iudicandi formam*, writing perhaps in the mid-1170s, likely either in an Anglo-Norman area or in the lower Rhine region, agreed that in the absence of express provision to the contrary, proof by two witnesses was obligatory.[35]

Among legists, too, the *testis unus, testis nullus* principle soon made inroads into the procedural literature. The legists' formulations of the principle were notably more flexible than those of the early canonists, however, and this more flexible view ultimately took hold in both legist and canonist literature.[36] Already by the early 1160s, jurists active in southern France had devised the concept of the presumption of fact: a legal rule that draws an inference, subject to rebuttal by contrary evidence, of the existence of some fact from the existence of some other fact or set of facts.[37] The procedural manuals *Si quis de re quacumque*, *Quedam iudiciorum preparativa explanaturi*, and *Inter cetera studiorum genera ars boni et equi*, composed in southern France between 1160 and about 1180 depending on the text, each make use of a presumption to soften the *testis unus, testis nullus* principle. *Si quis de re quacumque* restates the principle thus: "The voice of a single witness should under

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[34] Fowler-Magerl, "Fragmentarischer *ordo*," 264 ("nec unius testis vox admittitur").
[35] See Fowler-Magerl, "Iudicandi formam," 273 ("Unius enim testis vox […] non auditur, ut eius testimonio stetur. Duo ergo ad minus requiruntur […].").
[36] The earliest legist text in which the principle is formulated more flexibly is the Old Provençal version of *Lo Codi*. See Felix Derrer, *Lo Codi: Eine* summa Codicis *in provenzalischer Sprache aus dem XII. Jahrhundert; Die provenzalische Fassung der Handschrift A (Sorbonne 632)* (Zürich: Juris, 1974), 71 ("[U]n sol garenz non deu esser receubuz en plaig […] mas si autras semblanzas i sunt per que lo iutgues posca ueder que el diz uer, deura lo recebre […]."); see also Gouron, "*Testus unus*," 86.
[37] I say "early 1160s" because the theory of the presumption appears already in the *Summa Codicis* of Rogerius, a text datable to ca. 1162. This text is in turn indebted to the southern French second recension of the *Summa Trecensis*, attributed to Géraud le Provençal, which André Gouron has argued is the earliest text to treat the presumption as a means of proof. See André Gouron, "Placentinus, 'Herold' der Vermutungslehre?," in *Juristes et droits savants: Bologne et la France médiévale* (Aldershot, Eng.: Ashgate, 2000), 91.

no circumstances be admitted for proof, even if it shines forth with the authoritative reputation that the witness has already acquired; it may, however, contribute something of significance toward a presumption."[38] *Quedam iudiciorum preparativa explanaturi* and *Inter cetera studiorum genera ars boni et equi* state the principle somewhat more clearly, and in almost identical language. *Inter cetera* reads: "The voice of a single witness, even if it gleams with honor very clearly before the court, is not sufficient for proof; it is sometimes valid as a presumption, however."[39]

This more flexible southern French formulation of *testis unus, testis nullus* quickly became the preferred version of the principle in both legist and canonist procedural texts composed in the remaining years of the twelfth century. The possibility of making out a case with only one witness plus a factual presumption is suggested in the northern French canonist *ordo Tractaturi de iudiciis primo de preparatoriis iudiciorum*, from after 1160.[40] In the contemporary English canonist *ordo Quoniam ea que in civilibus negotiis*, the main body of the text states the older, stricter rule "that the response of a single witness shall not be heard, even if it gleams with some remarkable honor" of the witness; a later gloss, however, transforms this passage into the more flexible rule by explaining that a sole witness shall not

[38] *Placentini iurisconsulti uetustissimi de uarietate actionum libri sex*, lib. 4, at 105 ("Unius autem vox nullatenus ad probationem admittatur, etsi quamlibet praecepta dignitat[e] praefulgeat, licet ad praesumptionem nonnihil momenti possit adferre […].").
[39] London, British Library, MS Harley 3834, fol. 135r ("Unius autem uox etsi honore preclare curie fulgeat, non sufficit ad probationem, ualet tamen interdum ad presumptionem."). For the corresponding passage of *Quedam iudiciorum*, see Munich, Bayerische Staatsbibliothek, MS Clm 16084, fol. 71ra ("[U]nius autem uox non sufficit ut recipiatur, etsi honore preclare curie fulgeat. Interdum tamen loco presumptionis recipitur.").
[40] See Gross, *Incerti auctoris ordo*, tit. 1 (*ad quid fit editio*), § 1, at 89 ("Quandoque enim defitiunt actori testes et praetendit praeumptionem, i.e. conjecturam aliquam verisimilem, ut si non habeam nisi unum testem."); id., tit. 13 (*de numero testium*), § 3, at 121 ("Si vero unus tantum testis habeatur […] non perhibet testimonium, sed habeatur pro praesumptione.").

be heard "for the purpose of proof, although it is valid for the purpose of a presumption."[41] Other formulations of the principle along these lines can be found in canonist *ordines* from the late 1170s[42] and 1180s[43] as well as in the legist *Invocato Christi nomine* from the end of the century.[44]

We can thus summarize the state of the law in this area as of the end of the twelfth century by observing that both Roman and canon law had come to adopt a general principle of proof sufficiency. This principle theoretically required, as a general rule, a minimum quantity of proof consisting of the testimony of two witnesses. But at least in some cases the jurists, following new developments in southern France, held the testimony of a single witness to be sufficient to raise a rebuttable presumption in favor of the party bearing the burden of proof that that party had satisfied his or her burden.

I have so far been describing in outline two important means—principles of qualification and privilege on the one hand and the principle of proof sufficiency on the other—by which witnesses were regulated in twelfth-century Roman-canon procedure. There were also other norms affecting witnesses. For example, the author of *Invocato Christi nomine*, the last major *ordo* produced in the twelfth century, devotes an entire title to discussion of norms governing the procedure for the production of witnesses, and two titles to

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[41] Hänel, *Incerti auctoris ordo*, 34 ("Manifestissimi iuris est, ut unius testis responsio non audiatur, licet aliquo insigni honore praefulgeat."); id., gl. 115 ("ad probationem, quamvis valeat ad praesumptionem").

[42] For the rule in the *Summa Olim*, see Tamassia and Palmieri, "Iohannis Bassiani Libellus," § 408, at 237b ("Nec enim unus testis admittitur etiam si qualibet dignitate prefulgeat, licet unus ad presumptionem sufficere videatur, ut [Dig. 12.2.13].").

[43] For the rule in *Quia iudiciorum quedam sunt preparatoria*, see Schulte, "Der *ordo iudiciarius*," tit. 15 (*de testibus*), at 309 ("Sed nec unus testis audietur, ut secundum eum iudicetur. Sed per eum quandoque praesumitur, ut [C. 4 q. 3 c. 10(?)].").

[44] See Wahrmund, *Quellen*, vol. 5.1, pt. 4, tit. 43 (*de testibus*), at 97 ("Item unus solus testis non debet audiri, ut secundum eum iudicetur […]. Sed quandoque unus solus testis admittitur et secundum eum iudicatur […] maxime in iurisdictione voluntaria […]. Sed non ita in iurisdictione contentiosa, licet alias per eum quandoque multum presumatur […].").

discussion of the oath that witnesses had to swear before testifying; a fourth title sets forth factors for the judge to take into consideration in determining "to which witnesses credit should be given."[45]

I have nonetheless focused on the norms of qualification and proof sufficiency because they highlight with particular clarity the contrast between the law of witnesses and the law of positions as the latter developed a few years later. The law of positions admitted or excluded individual positions or questions from being put to the opposing party, one by one. By contrast, the law of witnesses as evidenced in the twelfth-century *ordines* shows practically no interest in regulating the content of individual questions. Witness testimony is instead regulated primarily either through rules of qualification, which accept or reject witnesses altogether, or through the *testis unus, testis nullus* principle, which sets a minimum quantity of witness proof.

3. EXPLANATIONS FOR THE DOCTRINE: TEXT, CULTURE, AND FUNCTION

What explains these structural elements of the twelfth-century law of witnesses? Why did the twelfth-century law of witnesses make apparently no attempt to regulate the individual questions put to a witness during examination, instead relying almost entirely on qualification and sufficiency rules? Three factors, none exclusive of the others, require consideration. One is the formative influence of the texts of the *Corpus iuris* and *Decretum*. Broader cultural norms of the Middle Ages are another factor. The third factor, on which I

[45] Id., at 104–7 (tit. 44, *qualiter et quando sit facienda testium productio*), 107–109 (tit. 45, *qualiter et quando testes iurare debeant*), 109–13 (*de iuramento testium*), 113–17 (*quibus testibus sit fides adhibenda vel non*).

will concentrate in the rest of this chapter, is the functional relationship between the law of witnesses and other elements of twelfth-century Roman-canon procedure.

3.1 Text

The text of the *Corpus iuris*, and to a lesser extent that of the *Decretum*, provided a model for at least one part of the law of witnesses as I have so far described it: the principles governing qualification and privilege of witnesses. In several areas of law, the classical Roman jurists had discussed both general principles for evaluating the qualifications of witnesses and specific norms excluding or privileging certain persons from testifying.

Some of these general principles can be found in passages discussing the role of the judge in the classical Roman form of procedure known as *cognitio extra ordinem*—an "extraordinary" or "special" hearing procedure as distinguished from the "ordinary" formulary procedure. In *cognitio* procedure, unlike the other main classical Roman forms of procedure, determination of law and fact was vested in the same decision maker instead of being split between a public official and a lay fact finder. The question of what principles should govern the evaluation of the facts were necessarily more salient in *cognitio* procedure than in other forms of procedure. We should thus be unsurprised to find discussion of general principles regulating the evaluation of witness qualifications in the third-century Roman jurist Callistratus in a fragment of his *De cognitionibus libri vi* (*Six Books on Hearings*), excerpted in book twenty-two of the *Digest*. Callistratus explains:

> The credibility of witnesses must be examined thoroughly. Thus one will have to investigate in the persons of witnesses, in particular, the condition of each one, whether someone is a municipal senator (*decurio*) or a plebeian; whether someone leads an honorable and blameless life or is in fact notorious and blameworthy; whether someone is wealthy or indigent, such that he may admit something for the sake of financial gain; whether someone is an enemy to the person against whom he is bearing witness, or a friend of the person for whom

> he is giving testimony. For if someone's testimony lacks cause for suspicion either because of the person by whom it is being given (because the person is honorable) or because of a motive (because there is no motive of financial gain, favor, or enmity), that person should be admitted.[46]

In the same text Callistratus also appears to state grounds for excusal or privilege from testifying, rather than disqualification. The jurist paraphrases a rescript of the emperor Hadrian: "Witnesses should not lightly be summoned from long distances, still less soldiers called away from their military duties, as the deified Hadrian said in a rescript."[47]

Outside Callistratus's *De cognitionibus*, a number of other passages in both the *Digest* and the *Code* also could be read as stating generally applicable qualification or privilege norms.[48] Thus, concerning the law of qualification, a fragment of Modestinus's *Regulae* (*Rules*) asserts that "[i]n the giving of testimony, dignity, credibility, moral character, and seriousness of demeanor must be examined; and for this reason witnesses who waver against the credibility of their own testimony must not be heard."[49] Concerning the law of privilege, a fragment of the jurist Scaevola remarks in general terms that "elderly and sick persons, soldiers, magistrates who are absent on state business, and persons to whom it is not

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[46] Dig. 22.5.3 pr. (Callistratus libro quarto de cognitionibus) ("Testium fides diligenter examinanda est. Ideoque in persona eorum exploranda erunt in primis condicio cuiusque, utrum quis decurio an plebeius sit: et an honestae et inculpatae vitae an vero notatus quis et reprehensibilis: an locuples vel egens sit, ut lucri causa quid facile admittat: vel an inimicus ei sit, adversus quem testimonium fert, vel amicus ei sit, pro quo testimonium dat. Nam si careat suspicione testimonium vel propter personam a qua fertur (quod honesta sit) vel propter causam (quod neque lucri neque gratiae neque inimicitiae causa fit), admittendus est.").
[47] Dig. 22.5.3.6 (Callistratus libro quarto de cognitionibus) ("Testes non temere evocandi sunt per longum iter et multo minus milites avocandi sunt a signis vel muneribus perhibendi testimonii causa, idque divus Hadrianus rescripsit. […]"); Alan Watson, ed., *The Digest of Justinian* (Philadelphia: Univ. of Pennsylvania Press, 1998), 2:193 (English translation).
[48] In addition to the fragments discussed in this paragraph, see also Dig. 1.9.2; Dig. 22.5.1.1; Dig. 22.5.9, .10, .23; Dig. 28.1.20.5; Cod. 9.41.6; Nov. 90.8.
[49] Dig. 22.5.2 (Modestinus libro octavo regularum) ("In testimoniis autem dignitas fides mores gravitas examinanda est: et ideo testes, qui adversus fidem suae testationis vacillant, audiendi non sunt.").

permitted to come" into court all hold privileges against testifying.[50] Privileges are also at issue in a fragment of the jurist Paul, applicable to all criminal proceedings, which discusses grounds for excusal arising from various personal relationships:

> The *lex Iulia* on criminal proceedings provides that no one who is unwilling should be summoned to give evidence in court against his father-in-law, son-in-law, stepfather, stepson, cousin, or cousin's child, or those nearer in degree; and likewise no one's freedman should be summoned nor the freedman of his child, parent, husband, wife, patron, or patroness. Further, that a patron or patroness cannot be compelled to give evidence against a freedman nor a freedman against a patron.[51]

In the *Code*, meanwhile, constitutions of the emperor Justinian and of the emperors Valerian and Gallienus respectively could be read respectively as disqualifying heretics and domestic servants from testifying.[52]

Moreover, over and above those fragments of the *Corpus iuris* that were of apparently general applicability, several more passages of the *Corpus* could be found in which norms of qualification or privilege were applied only to one particular area of law, but might easily be extended or generalized. Callistratus's *De cognitionibus*, for example, lists categories of person who are disqualified from testifying against a defendant accused under a specific

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[50] Dig. 22.5.8 (Scaevola libro quarto regularum) ("Inviti testimonium dicere non coguntur senes valetudinarii vel milites vel qui cum magistratu rei publicae causa absunt vel quibus venire non licet.").

[51] Dig. 22.5.4 (Paulus libro secundo ad legem Iuliam et Papiam) ("Lege Iulia iudiciorum publicorum cavetur, ne invito denuntietur, ut testimonium litis dicat adversus socerum generum, vitricum privignum, sobrinum sobrinam, sobrino sobrina natum, eosve qui priore gradu sint, item ne liberto ipsius, liberorum eius, parentium, viri uxoris, item patroni patronae: et ut ne patroni patronae adversus libertos neque liberti adversus patronum cogantur testimonium dicere.").

[52] See Cod. 1.5.21 pr. ("Quoniam multi iudices in dirimendis litigiis nos interpellaverunt, indigentes nostro oraculo, ut eis reseretur, quid de testibus haereticis statuendum sit, utrumne accipiantur eorum testimonia an respuantur, sancimus contra orthodoxos quidem litigantes nemini haeretico vel etiam his qui iudaicam superstitionem colunt esse in testimonia communionem, sive utraque pars orthodoxa sit sive altera."); Cod. 4.20.3 ("Etiam iure civili domestici testimonii fides improbatur.").

Roman statute, the *lex Iulia de vi*.[53] Similarly, a passage of the jurist Ulpian, taken from his commentaries *Ad Masurium Sabinum libri li*, holds that a woman is disqualified from testifying in testamentary causes but is competent to testify in other cases.[54]

I have so far been discussing passages of the *Corpus iuris* that touch on the issues of testimonial qualification and privilege; however, a few passages of Gratian's *Decretum* also address the same issues. *Causa* three, *quaestio* five of book two of the *Decretum* in particular discusses testimonial qualification at several points. Thus the blood relation of an accuser is barred from testifying against an unrelated defendant; a personal enemy of a party cannot testify against that party; and persons who are "under suspicion, or enemies, or easily prone to litigation" as well as "those who do not have a good manner of life, or whose lives are blameworthy, and who do not lead upright lives and teach the faith" are "exclude[d]" from testifying.[55] Most comprehensive of all is a letter of Pope Eusebius disqualifying as "infamous" all "murderers, enchanters, thiefs, temple robbers, abductors, adulterers, unchaste persons, poisoners, suspect persons, slanderers, household servants, perjurors, and those who

[53] See Dig. 22.5.3.5 (Callistratus libro quarto de cognitionibus) ("Lege Iulia de vi cavetur, ne hac lege in reum testimonium dicere liceret, qui se ab eo parenteve eius liberaverit, quive impuberes erunt, quique iudicio publico damnatus erit qui eorum in integrum restitutus non erit, quive in vinculis custodiave publica erit, quive ad bestias ut depugnaret se locaverit, quaeve palam quaestum faciet feceritve, quive ob testimonium dicendum vel non dicendum pecuniam accepisse iudicatus vel convictus erit. Nam quidam propter reverentiam personarum, quidam propter lubricum consilii sui, alii vero propter notam et infamiam vitae suae admittendi non sunt ad testimonii fidem.").
[54] See Dig. 28.1.20.6 (Ulpianus libro primo ad Sabinum) ("Mulier testimonium dicere in testamento quidem non poterit, alias autem posse testem esse mulierem argumento est lex Iulia de adulteriis, quae adulterii damnatam testem produci vel dicere testimonium vetat.").
[55] C. 3 q. 5 c. 1 ("Consanguinei accsuatoris adversus extraneos testimonium non dicant […]."); C. 3 q. 5 c. 2 ("Accusatores, et testes esse non possunt, qui ante hesternum diem […] inimici fuerunt […]."); C. 3 q. 5 c. 4 ("Suspectos, aut inimicos, aut facile litigantes, et eos, qui non sunt bonae conversationis, aut quorum vita est accusabilis, et qui rectam non tenent, et docent fidem, accusatores esse, et testes […] excludimus.").

have committed plunder, or have given false testimony, or who are of a sort that would have dealings with enchanters and diviners."[56]

Direct influence of these norms on the writers of the twelfth-century *ordines* is apparent in many of the twelfth-century *ordines*. The influence of Roman norms can be found even in earliest work of the genre, Bulgarus's *Karissimo amico et domino A.*, where the instruction of the Roman jurist Modestinus in Dig. 22.5.2 to consider the *dignitas fides mores gravitas* of a potential witness is tacitly restated: "In testibus fides, dignitas, mores, gravitas examinanda est."[57] A restatement of the same fragment appears in the English canonist text *Quoniam ea que in civilibus negotiis*, which also lists criteria closely modeled on those of Callistratus at Dig. 22.5.3 pr. for determining the competency of a witness.[58] Just as Callistratus had explained that "in the persons of" witnesses "the condition of each one" had to be investigated, including "whether someone leads an honorable and blameless life or is in fact notorious and blameworthy, whether someone is wealthy or indigent," and so forth, the canonist author of *Quoniam ea que in civilibus negotiis* explains that "in the persons of witnesses condition and fortune must be examined: whether one is noble or plebeian, whether of honorable and commendable life or blameworthy and dishonorable, whether of cheerful reputation or bad fame, whether wealthy or indigent," and so on.[59]

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[56] C. 3 q. 5 c. 9 ("Constituimus […] ut homicidae, malefici, fures, sacrilegi, raptores, adulteri, incesti, uenefici, suspecti, criminosi, domestici, periuri, et qui raptum fecerunt, uel falsum testimonium dixerunt, seu qui ad sortilegos, diuinosque concurrerint, similesque eorum nullatenus […] ad testimonium sint admittendi, quia infames sunt […].").
[57] Wahrmund, *Quellen*, 4.1:6.
[58] See Hänel, *Incerti auctoris ordo*, 32 ("In testibus fides, gravitas, mores, dignitas examinanda sunt […].").
[59] Id. ("[E]t ideo in personis eorum exploranda est conditio et fortuna, utrum nobilis sit an plebeius, utrum honestae vitae vel probabilis vel culpatae et inhonestae, utrum hilaris famae vel infamiae, utrum locuples vel egenus, utrum lucri causa quid facile admittant, utrum ei amicus, pro quo testimonium fert, an ei inimicus, contra quem testimonium dicit.").

The direct influence of canonical, rather than Roman, norms is also apparent in a number of twelfth-century *ordines*. The *Rhetorica ecclesiastica*, likely the earliest canonist *ordo*, defines the disqualified category of "infamous" persons by quoting directly from the passage of Pope Eusebius that as we have already seen is incorporated into the *Decretum* as C. 3 q. 5 c. 9: "Eusebius: We, with all those bishops who are with us, ordain that murderers, enchanters, thiefs, temple robbers, abductors, adulterers, unchaste persons, slanderers, and others of this sort shall by no means be admitted to accusation or testimony […]."[60] Also directly quoted is a letter of Callixtus I, attributed to Celestine I(?) in the *Rhetorica*, that as we have seen is incorporated into the *Decretum* as C. 3 q. 5 c. 1: "Moreover, on authority of Pope Celestine: blood relations must not be admitted to testify against an unrelated person."[61] Among later twelfth-century *ordines*, the English/Irish canonist *Quia iudiciorum quedam sunt preparatoria* engages especially closely with the norms of the *Decretum*. For example, the author simply incorporates all the categories of disqualification mentioned in C. 3 q. 5 of the *Decretum* directly into the *ordo*: "Some persons are excluded from testifying *ipso iure*, others at the judge's discretion. [Those disqualified] *ipso iure* [are] as provided in C. 3 q. 5, as well as those who are kept in public chains, and anyone who has hired himself out to fight with beasts, or who openly carries out a shameful means of employment, as well as those who have accepted money for their testimony on a prior occasion […]."[62]

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[60] Wahrmund, *Quellen*, 1.4:72 ("Eusebius: constituimus cum omnibus, qui nobiscum sunt, episcopis, ut homicidae, malefici, fures, sacrilegi, raptores, adulteri, incesti, criminosi et ceteri huiusmodi nullatenus ad accusationem vel ad testimonium sint admittendi […].").
[61] Id. at 73 ("Item ex auctoritate Coelestini papae: consanguinei non sunt in testimonio contra extraneum admittendi.").
[62] Schulte, "Der *ordo iudiciarius*," tit. 15 (*de testibus*), at 308 ("Repelluntur a testimonio quidam ipso iure, quidam per officium. Ipso iure ut C. III. q. 5. et qui in publicis vinculis habentur, et qui ut cum bestiis pugnaret se locaverit et qui palam turpem questum facit et qui ob testimonium dudum pecuniam acceperunt […].").

These passages are only a few examples of the direct adoption of norms regulating witness qualification from the *Corpus iuris* and the *Decretum*, or the *Decretum*'s predecessors collections of canons, into the twelfth-century *ordines*. My purpose in citing these examples is not to conduct an exhaustive study of the extent to which the twelfth-century jurists borrowed from the Roman and canon corpora or innovated independently. I have referenced these passages from the *ordines* simply to show that the twelfth-century procedural writers were well aware of the extensive and detailed discussion of witness qualification in the *Corpus iuris* and *Decretum*, and that whether or not they incorporated all of the ancient norms into their own treatments of procedure, they at least felt themselves bound to require judges to conduct an analysis of witness qualification.

In the area of proof sufficiency, meanwhile, the ancient authority for the *testis unus, testis nullus* principle was much weaker than the authority for witness qualification rules.[63] The strongest authority in the *Corpus iuris* was a fragment of the jurist Paul discussing a specific case in which a widower claimed that a third party had owed his late wife, and now him as heir, a certain sum of money. The widower produced only a single witness to testify to the existence of the debt. The third party responded that "it was not permissible for the testimony of only one person to be admitted" (*testimonium non oportere unius hominis admitti*) and appealed the resulting adverse judgment to the Roman emperor. According to Paul, the emperor held that "credit should not be given to the testimony of only one person and that the appeal had therefore rightly been taken" (*habita unius testimonio non esse credendum ideoque recte provocatum*).[64] Religious texts were even less promising sources.

[63] See Gouron, "*Testis unus*," 83–84.
[64] Dig. 48.18.20 (Paulus libro tertio decretorum).

The best authority was provided by the Biblical exhortation, "In the mouth of two or three witnesses shall every word stand."[65]

Against this robust textual authority for the twelfth-century proceduralists' discussion of witness qualification, and the at best mediocre textual authority for the *testis unus, testis nullus* principle, there was no positive authority in either the *Corpus iuris* or the *Decretum* for interposing rules of admissibility in the examination of witnesses during trial. Passages could be found criticizing pleadings with superfluous information,[66] disapproving of a party's production of proof of a legally irrelevant fact,[67] or chiding parties for arguing a legally irrelevant issue.[68] None of these passages provided clear authority for imposing rules on the process of witness examination, however.

Overall, then, the *Corpus iuris* and *Decretum* offered the twelfth-century jurists compelling authority for introducing at least some principles of witness qualification; the authority for other forms of witness regulation was much weaker.

3.2 **Culture**

If the intellectual influence of the *Corpus iuris* and *Decretum* offers one explanation for the shape of the twelfth-century law of witness, the mentalities of the twelfth century offer a complementary, albeit admittedly vaguer, explanation. The social and gender stratifications of the high Middle Ages are a historiographical commonplace. Nonetheless, at least in the law of witness qualification, the writers of the twelfth-century *ordines* themselves occasionally discuss explicit policy grounds for one or another disqualified category. Their

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[65] 2 Cor. 13:1 ("[I]n ore duorum vel trium testium stabit omne verbum."); see also Mt. 18:16 ("[S]i autem non te audierit adhibe tecum adhuc unum vel duos ut in ore duorum testium vel trium stet omne verbum.").
[66] See Cod. 7.62.39.
[67] See Cod. 4.19.22.
[68] See Cod. 4.12.1.

discussion reveals some of the social determinants of witness credibility that may well have helped to make regulation of witnesses by means of principles of disqualification particularly attractive.

Some of these policy grounds are drawn directly from the *Corpus iuris* itself. For example, to explain why poverty is a valid ground for disqualifying a potential witness, the English canonist author of *Quoniam ea que in civilibus negotiis* simply restates the explanation given in the *Digest*, namely that a poor person "might easily admit something for the sake of money."[69] A rationale of classical Roman law is adopted even more explicitly in the *ordo Etiam testimonia removentur*. There, the author recounts that the rule disqualifying persons of "servile" status from testifying "was enacted by the most experienced [Roman] emperors." The rule is justified, he explains, in part by the empirical consideration that "slaves can easily be corrupted in this manner and hired for a small amount of money to perjure themselves." In part it is also justified by the normative consideration, taken from the Roman concept of *ius civile*, that slaves are not citizens, and thus should not be permitted to testify in a proceding conducted *civiliter*—i.e., in a civil case.[70]

Other policy grounds of the twelfth-century procedural writers seem to reflect contemporary mentalities at least as much as the earlier thought worlds reflected in the texts of the *Corpus iuris* and the *Decretum*. For example, the ubiquity in the high Middle Ages of what Marc Bloch called *liens de dépendance* is reflected in several remarks of the French canonist author of *Tractaturi de iudiciis primo de preparatoriis iudiciorum*. The author

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[69] Compare Dig. 23.5.3 pr. ("an locuples vel egens sit, ut lucri causa quid facile admittat"), with Hänel, *Incerti auctoris ordo*, 32 ("utrum locuples vel egenus, utrum lucri causa quid facile admittant").

[70] Fowler-Magerl, "Fragmentarischer *ordo*," 264 ("[N]on […] servi admittuntur. Placuit enim consultissimis principibus, ne servilis persona recipiatur. Servi enim corrumpi possunt leviter, ita et, ut periurent, parvo conduci; et cum ius civiliter agendum sit, servo vero cives non sint, in tractatu civili admittendi non sunt.").

explains several disqualification rules in terms that make clear his underlying concern that a relationship of social dependence may lead the dependent party in the relationship to testify falsely. Thus "friends" (*quidam amicorum*)—possibly meaning members of a patronage network—of an accuser are disqualified from testifying if "the accuser can give orders to them" (*quibus accusator inperare potest*).[71] Members of the household of a party to a criminal proceeding are generally disqualified from testifying. The author explains, however, that the criterion for disqualification is not whether the potential witness lives in the same house as the party, but whether the potential witness's position is such that the head of the household can give orders to him or her; only the latter category is disqualified.[72]

3.3 **Function**

The textual and cultural explanations that I have sketched out go far in explaining why the twelfth-century jurists would have found disqualification rules, and to a much lesser extent the *testis unus, testis nullus* principle, natural and attractive means of regulating witnesses. There is, however, a complementary functionalist explanation for why rules of qualification and sufficiency were the jurists' chosen means of regulating witness testimony in the twelfth century. Although twelfth-century parties produced their own witnesses, examination of those witnesses was in principle conducted by a judge or other court official outside the parties' presence and largely outside the parties' control. In this procedural environment, in which witness examination was subject to the near-total discretion of the judicial examiner, norms of qualification were perhaps the only effective means of shaping the cognitive process of the fact finder, either by removing a witness from the fact finder's

[71] Gross, *Incerti auctoris ordo*, § 5, at 117.
[72] See id., § 6, at 118 ("Similiter domesticum testimonium repellitur in criminali causa; sed intellige caute domesticum testimonium, non omnes, qui in eadem domo sunt, sed eos, quibus paterfamilias inperare potest, ut servis propriis etc.").

consideration altogether, ex ante, or by preventing the fact finder from justifying a decision, ex post, on the basis of the testimony of a disqualified witness.[73] Rules of sufficiency, meanwhile, could operate as a backstop measure against the fact finder's reliance on low-quality testimony.

Certainly the initial selection and production of witnesses was the sole responsibility of the parties to litigation, not the judge. Party control over the production of witnesses is presupposed by both legist and canonist authors of *ordines* from the very earliest through the end of the twelfth century. Indeed, such control is almost logically implied by the adversarial character of twelfth-century procedure, such that explicit theoretical discussion of the subject was not even considered to be necessary.

Among the canonist *ordines*, presupposition of party control over witness production is apparent, for example, in an observation made in the north German *ordo* the *Rhetorica ecclesiastica*. The author observes that if one party "introduces" a person as witness "for proof of his case," but then dismisses him without ever calling him to testify, that witness can generally then be called to testify by the opposing party.[74] A witness in this sense "belonged" to the party who produced him unless that party released him before he had testified. The same assumption is revealed in both the English or Irish *ordo Quia iudiciorum quedam sunt*

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[73] Reasoned judgments are the exception rather than the rule in twelfth-century practice, so that it is fair to wonder what purpose a rule of disqualification could have served if it were applied, as some *ordines* suggested it could be, only after the disqualified witness had already been examined. In at least some areas, however, such as Genoa, decisions often included brief explanations of their factual bases. In such places, ex post disqualifications may well have operated as real constraints on decision making. For a typical example from the territory of Genoa, see Chiaudano and Morozzo della Rocca, *Oberto Scriba de Mercato (1190)*, no. 62, at 27 ("quoniam cum incepiset probare quod minor erat cum Tarantus emit eam, defecit in probacione et Tarantus probavit quod iuste emerat eam et iusto titulo").

[74] Wahrmund, *Quellen*, 1.4:75 ("Nec est ignorandum, quod si testes, quos quis ad probationem causae suae introducit, ab eo fuerint aversi et oppositae parti voluerint attestari, non possunt ab eo, a quo primo producti sunt, repelli, nisi manifesta causa possit assignari, pro qua debuissent averti.").

preparatoria and the English or Scottish *Summa Olim* when their author refer respectively to witnesses being "introduced by each side" and to witnesses being "produced once, twice, or three times by the same party" and being sworn "in the presence of the party against whom they are produced."[75] In the *ordo Editio sine scriptis*, produced in England or France, the author goes as far as to observe that the party producing a witness is responsible for the costs of attendance.[76]

A similar assumption that witness production is in the control of the parties is consistently made in the twelfth-century legist *ordines*. For example, the southern French text *Si quis de re quacumque*, like the somewhat later canonist *Editio sine scriptis*, specifies that the costs of a witness are at the charge of the party who produces him; the provision naturally presupposes that production of witnesses is under the parties' control.[77] The legist author of *Invocato Christi nomine*, writing at the end of the century, is quite explicit that under the *ius commune* "a litigant may produce witnesses [up to] three times."[78]

Yet while production of witnesses was in the hands of the parties, direct and indirect evidence indicates that examination of witnesses was in the hands of the judge, not the parties or their lawyers. Indeed, by the late twelfth century it is clear that the judge held the power to

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[75] Schulte, "Der *ordo iudiciarius*," 310 ("si plures testes ab utraque parte introducantur"); Tamassia and Palmieri, "Iohannis Bassiani Libellus," §§ 398, 413, at 237a–b ("Iurare debent etiam eo presente contra quem producuntur […]. Possunt ab eadem parte testes semel, bis, ter produci […].").

[76] See Wahrmund, *Quellen*, 2.3:44 ("Item venturis ad iudicium provideatur a productore, ut C. eod. tit. Venturis ad iudicium per accusatorem aut ab hiis, per quos fuerint postulati, sumptus competentes ministrentur, etiam si in pecuniaria causa ab alterutra parte testes producendi sunt [Cod. 4.20.11].").

[77] See *Placentini iurisconsulti uetustissimi de uarietate actionum libri sex*, lib. 4, at 105 ("[P]raeterea sumptus testibus sunt praestandi ab his qui eos producendos putauerint.").

[78] Wahrmund, *Quellen*, vol. 5.1, pt. 4, tit. 44 (*Qualiter et quando sit facienda testium productio*), at 104 ("Sic ergo ter potest litigator testes producere.").

choose the line of questioning to be taken and that he or another court official thereafter typically examined each witness in total seclusion from the parties and from other witnesses.

This evidence in the earliest procedural texts is admittedly exiguous. Bulgarus, writing in *Karissimo amico et domino A.*; the canonist authors of *Etiam testimonia removentur*, *Cum de criminalibus questionibus*, and *Iudicandi formam in utroque iure*, all from Germany; the canonist authors of *Tractaturi de iudiciis*, from France, and *Quoniam ea que in civilibus negotiis*, from England; and the southern French legist author of *Si quis de re quacumque* are all silent on the mechanics of examination.

Moreover, those authors who do discuss the examination procedure are largely unhelpful. The canonist author of the *Rhetorica ecclesiastica*, from northern Germany, does mention examining procedure briefly. But he gives no indication of *who* was supposed to conduct, and be present at, the examination. The discussion instead extends only to the administration of the oath taken by witnesses and the form in which the witness is to testify. The author explains: "Now it remains to talk about the method of giving testimony. The sacred Gospels are to be placed in view, and the person who is to testify must swear, touching the Gospels with his hand, that he will testify nothing other than what is true. Then the testimony shall be given concerning only those things that were seen and heard in person, and in the form of affirmative, not negative testimony, and in the witness's own live voice, not by writing and response."[79] The northern French canonist text *In principio de ordine iudiciario agitur* discusses witness examination in similarly unhelpful terms. After describing the procedure for producing and swearing in witnesses, the author goes on to say only that the

[79] Wahrmund, *Quellen*, 1.4:76 ("Amodo superest dicere de modo perhibendi testimonium. Proponenda sunt sacrosancta evangelia, quibus manu tactis iurare debet ipse testaturus, se non aliud, quam quod verum sit, testaturum. Deinde perhibendum est testimonium, non de aliis, quam de visis praesentialiter et auditis, nec de negatione, sed affirmatione, nec per scriptum aut responsalem, sed propria voce et viva.").

witnesses "then shall be quite diligently examined" to determine whether they agree about the circumstances of the case.[80] Among the early legist *ordines*, meanwhile, the southern French *Quedam iudiciorum preparativa explanaturi* implies that examination was expected to be at least judge-supervised, and possibly judge-conducted. But the author merely states in passing that "depositions of witnesses [are] made before their judge or arbiter," without clearly indicating how the examination was structured and who else might be present.[81]

This near silence of *ordines* composed during or before the 1170s on the details of witness examination is broken, however, by proceduralists writing in the last two decades of the twelfth century. The canonist author of *Iudicium est trinus personarum trium actus*, an *ordo iudiciarius* probably from Canterbury, raises for the first time the question of who is allowed to be present during witness examination, noting a division of opinion and practice:

> Witnesses […] having been sworn are examined on those events that took place in their presence. During the examination the advocates for each party are present, although they put forward nothing on behalf of their party; or according to some, only the advocate for the opposing party is present for the other party; or according to another custom, neither party is present.[82]

This passage implies that examination of witnesses was conducted by the judge, or in any event by some court officer, not by the parties or their advocates. The text gives no indication of whether the parties could be present, but it makes clear that advocates, when they were allowed to be present at all, were permitted only to observe, not to intervene in the proceeding. It also strongly suggests that the norms regulating the participation of other

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[80] Kunstmann, "Ueber den ältesten *ordo judiciarius*," 19 ("Deinde diligentius examinabuntur, si consoni, si varii circa rem vel circa locum vel circa tempus et alias circumstantias […].").
[81] Munich, Bayerische Staatsbibliothek, MS Clm 16084, fol. 71ra ("testium deposiciones ante suum iudicem uel arbitrum facte").
[82] Fowler-Magerl, "Iudicium est trinus personarum trium actus," 299 ("[T]estes [… i]urati examinantur et super hiis interrogantur, que sub eorum presentia gesta sunt. In examinatione utriusque partis intersunt advocati nil ex parte sua proponentes, vel secundum aliam consuetudinem neuter advocatus interest.").

persons in the examination were in flux. The author's mention of "custom" implies that court practice differed from place to place; the phrase "according to some" (*secundum quosdam*) further implies a difference of scholarly opinion in addition to a difference in practice.

The uncertainties suggested by *Iudicium est trinus personarum trium actus* are clarified in *ordines* from the last two decades of the twelfth century. Most important, the French canonist author of *Videndum est quis sit ordo*, writing in the second half of the 1180s, states explicitly that once witnesses have been sworn in, "having been separated from one another, they will then be examined in secret by the judge and asked about what happened."[83] This author is thus either unaware of the debate alluded to in *Iudicium est trinus personarum trium actus*, or considers the debate to have been resolved in favor of a mode of examination in which the judge examined a single witness alone, secluded from all other participants in the trial.

The mode of examination discussed in *Iudicium est trinus personarum trium actus* was a striking innovation for jurists conversant with the texts of the *Corpus iuris*. None of the various procedures of classical Roman law provided for witness examination in seclusion. Although Roman procedures differed in whether they allocated primary examining authority to the parties or to the judge, the two main ancient Roman civil procedures—formulary procedure and *cognitio extra ordinem*—agreed in conducting witness examination in open court. At least some twelfth-century jurists were quite conscious of the extent to which they were departing from these practices. The canonist author of *Quia iudiciorum quedam sunt preparatoria*, writing in England or Ireland shortly after 1182, says nothing explicit about the mode of examination of witnesses. He instead makes only an odd remark about the normative

[83] Linda Fowler-Magerl, ed., "Videndum est, quis sit ordo," in Ordo iudiciorum, 295 ("Postea separatis eis secreto examinabuntur a iudice et res gesta ab eis queretur […].").

basis for examination, which he says is not Roman or canon law but the Bible: "[I]t should be noted that examination of witnesses was introduced not by *leges* [i.e., the *Corpus iuris*] or by canons [i.e., the *Decretum*], but by Daniel […]."[84] The author of *Quia iudiciorum quedam sunt preparatoria* is presumably referring to the story of Susanna and the elders in the deuterocanonical chapter thirteen of the Book of Daniel, in which Daniel separates two witnesses from one another and examines each in seclusion in order to find the facts in the case. The reference is a tacit admission that the practice of witness examination with which the author was familiar constituted a departure from the procedures sanctioned by Roman and canon norms.

Although the late twelfth-century *ordines* I have been discussing were the work of canon lawyers, the practice of judicial examination of single witnesses in isolation had also won acceptance among legists by the end of the century. The legist author of *Invocato Christi nomine*, writing during or shortly after 1198, notes without further elaboration that a witness, after being sworn in, is to proceed to the *secretarium iudicis*, the judge's private chambers, for examination.[85] The brevity of the author's treatment of the issue suggests that at least in Tuscany, where *Invocato Christi nomine* was composed,[86] the practice was already taken for granted.

This process of formalization of judicial examination of witnesses, in secret, that I have been describing is most readily apparent in *ordines* from the last two decades of the twelfth century, above all the sophisticated late-century *Invocato Christi nomine*. But it can be confirmed by comparison with scattered texts of definitive sentences and arbitral awards

[84] Schulte, "Der *ordo iudiciarius*," 311 ("Amplius sciendum, quia examinatio testium non per leges nec per canones, sed per Danielem introducta est […].").
[85] Wahrmund, *Quellen*, vol. 5.1, pt. 4, tit. 43 (*de testibus*), at 110.
[86] Fowler-Magerl, Ordo iudiciorum, 121.

from different communes of northern Italy. These texts occasionally indicate that examination was conducted by the judge or by another court official and in seclusion from other persons. An 1163 arbitral award from Verona, for example, states that a certain witness Viviano, after being duly sworn, was "examined under the constraint of the oath by Arduino," one of the two arbitrators in the case, "in the presence of" the other arbitrator "Alberico Pastora and the notary Albertino"; the sentence notes that another witness was examined "in similar fashion" (*similiter*).[87] In so stating, the sentence suggests that the practice of judge-controlled, secret witness examination began well before it was explicitly recognized in the *ordines*, since one of the arbiters was indicated as the examiner, and only the arbiters and a notary were indicated as being present at the examination. From the turn of the thirteenth century, a transcript of witness testimony (*testimoniale*) taken in a proceeding before a papal judge delegate suggests that the same procedure was being used at the end of the century too. The case concerned whether the priest of the churches of San Pietro and San Nicolò, which served Pisans living in Constantinople, held the right to baptize children. The notary, writing in the first person, recounts that one of the parties—it is unclear whether the party was the plaintiff or the defendant—produced several witnesses "in the presence of the venerable priest Don Giovanni, chaplain of the lord pope and legate of the Apostolic See." The notary then notes that the first witness was "diligently examined in my presence by the aforenamed legate Don Giovanni."[88]

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[87] Emanuela Lanza, ed., *Le carte del capitolo della cattedrale di Verona*, vol. 2, *(1152–1183)* (Rome: Viella, 2006), 63 ("Vivianus iuratus et ab Arduino presente Alberico Pastora et Albertino notario per districtum sacramenti interrogatus dixit: […]. Oto de Vecla iuratus et similiter interrogatus dixit idem […].").

[88] Fiorella Nuti, "Le pergamene dell'Archivio di Stato di Pisa dal 1200 al 1204," adv. Cinzio Violante (tesi di laurea, Università degli studi di Pisa, 1965–66), 6–7 ("[S]acerdos Benenatus […] coram domino et venerabili sacerdote Johanne, domini pape capellano et apostolice sedis legato, hos idoneo produxit testes; Quorum primus Dominicus de Pilotto iuratus et a

Neither these records of practice nor the *ordines* say expressly why individual, *in camera* judicial questioning of witnesses had become the preferred mode of examination by the late twelfth century. But it is at least clear that subornation of witnesses by the parties or by other witnesses was an important concern. The canonist author of *In principio de ordine iudiciario agitur* suggests this concern when discussing the evaluation of witness testimony in a passage from which I have already quoted:

> Next [the witnesses] will be quite diligently examined: whether they are in agreement, whether they are in disagreement about the subject matter, or about place, or about the time and other circumstances; whether they all offer suborned words, and words that were obviously dictated to them by someone or that they obviously put together among themselves out of partiality.[89]

This passage gives the most plausible underlying rationale for judge-conducted examination and isolation of witnesses both from one another and from parties and their lawyers. The author suggests that witness testimony can be subverted in several ways: by outright subornation of perjury (*verba subornata*, "suborned words"), by witness coaching (*quae pateant ab aliquo eis dictata esse*, "words that were obviously dictated to them by someone"), or by witnesses colluding among themselves in favor of the party who produced them (*quae pateant* […] *inter se studiosius contulisse*, "words that they obviously put together among themselves out of partiality (*studiosius*)"). Judicial examination *in camera* mitigates these risks inherent in an adversarial, party-controlled system of witness production.

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prenominato domino Johanne legato diligenter coram me examinatus, hoc inde se scire dixit: […].").

[89] Kunstmann, "Ueber den ältesten *ordo judiciarius*," 19 ("Deinde diligentius examinabuntur, si consoni, si varii circa rem vel circa locum vel circa tempus et alias circumstantias, si omnes verba subornata proferant, et quae pateant ab aliquo eis dictata esse vel inter se studiosius contulisse.").

The account I have presented so far lends itself naturally to a functionalist explanation for the shape of the law of witnesses in the late twelfth century. As the *ordines* I have just quoted from suggest, witness examination itself was largely a black box for the parties and their lawyers, who would have had no opportunity to interject during the examination with questions or objections of their own. Because the parties and their representatives could not be present in the examination room, there was little incentive in the twelfth century to develop rules regulating individual witness questions and answers similar to the rules governing positions. Such rules would not have served much purpose. Parties' best option was instead to argue about the competency of witnesses before or after the witnesses had testified. The extensive discussion of witness qualification in most of the twelfth-century *ordines* suggests that parties in both secular and ecclesiastical courts regularly did precisely that.

4. PARTY CONTROL OF EXAMINATION AND THE EMERGENCE OF RULES OF ADMISSIBILITY

The formalization of judicial witness examination in the late twelfth-century *ordines* that I have been describing was soon followed, at a lag of several decades, by one further development: the emergence of a practice of submitting party-drafted questions for the judge to put to witnesses during examination.

Such a practice is first attested in the procedural literature at the very end of the twelfth century, in the practically oriented *Invocato Christi nomine*. The author explains:

> And it should be known that before witnesses are questioned or enter the judge's private chamber, a *titulus* is written by the parties [sic], in which is contained in what manner and wise and in which or about which headings the party's witnesses or the witnesses of the opposing party should be questioned; and it is submitted to the judge, who shows

> it immediately to the other party so that he may write his own *titulus*, if he wishes […].[90]

This passage helps us to understand how the judge-controlled system of witness examination worked in practice. The proceduralists' insistence that witness examination should be conducted by the judge, in seclusion from the parties, was in natural tension with the party-controlled character of most other elements of procedural action. Since the parties were responsible for producing witnesses, and for determining the elements of fact on which each witness would be able to testify, they held a substantial informational advantage over the examiner, who would often have needed guidance from the parties about why a particular witness had been produced and what lines of questioning might be most fruitful.[91] The author of *Invocato Christi nomine* reveals that this tension was in practice resolved by requiring the party producing a witness to submit a document (*titulus*) to the judge and to the opposing party on which the party's proposed line of questioning was written down. The opposing party then had the option to submit his own *titulus* for adverse questioning of the same witness.

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[90] Wahrmund, *Quellen*, vol. 5.1, pt. 4, tit. 46 (*de iuramento testium*), 110–11 ("Et sciendum est, quod, antequam testes interrogentur vel intrent secretarium iudicis, titulus scribitur a partibus, quo continetur, qualiter et quomodo et in quibus vel de quibus capitulis sui testes vel partis adverse interrogentur, et iudici porrigitur, qui alteri parti statim illum ostendit, ut scribat suum, si vult; quoniam omnia sunt edenda, quibus quis usurus est in iudicio, ut supra dictum est.").

[91] Cf. Arthur Taylor von Mehren, "The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks," in *Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag*, ed. Norbert Horn (Munich: Beck, 1982), 2:367 ("[B]ecause of his active role in the pretrial phase, the lawyer [in procedural systems with an extensive pretrial phase] typically has a greater understanding of the case than does the judge […] when presentation of the controversy begins at trial. Accordingly, the adjudicator is hardly in a position to play a dominant role in the presentation of the case; the lawyers naturally handle the questioning of witnesses and the general presentation of the case.").

Although the ephemeral nature of the *titulus* offers little hope for finding much corroboration of *Invocato Christi nomine* in pre-thirteenth-century practice, the existence of at least one Tuscan document from the second half of the twelfth century proves that the author of *Invocato Christi nomine* was describing a current procedural technique. The fragmentary text, dating from sometime in the second half of the twelfth century,[92] is written as a series of imperatives suggesting lines of inquiry for the examination of witnesses in a property dispute involving the collegiate church of Santo Stefano in Prato. The church alleged that it had acquired property some years before from a decedent, Panfollia, through a testamentary devise, whereas the other side in the litigation apparently alleged that the property in dispute had instead passed to Panfollia's widow Campiscana. The content of the suggested questions makes clear that the *titulus* was drawn up on behalf of the collegiate church. The polite second-person plural imperative, the usual form of address for judges that jurists give in mock dialogues, implies that the suggestions are directed toward the examining judge. A sample of suggested questions shows the way in which a *titulus* could inform an examining judge of the party's overall litigation strategy:

> Please ask the witnesses whether they were in attendance when Panfollia, in his last will, with the masters of his household present and willing, assigned to the canons [sc. of the collegiate church] all the property that the church had or in any way held from him or from his household or from his ancestors in general […]. Also, please ask for what length of time the canonry held the property in Gonfienti and the property in Pantano, on its own behalf, and without disturbance […]. Also, please ask whether Campiscana or another on her behalf had possession of the aforesaid properties. […][93]

[92] Only a later copy survives; in the absence of palaeographical clues, only the names in the document allow the *titulus* to be dated at all. See Renzo Fantappiè, ed., *Le carte della propositura di S. Stefano di Prato*, vol. 1, *1006–1200* (Florence: Olschki, 1972), 499–500.
[93] Id., app. no. 2, at 500 ("Querite a testibus si interfuerunt quando Panfollia, in ultima voluntate sua, presentibus rectoribus sue domus et uolentibus, iudicauit canonicis omnia que habebat ecclesia aut quolibet modo tenebat ab eo uel a domo sua et a suis antecessoribus in genere […]. Item, querite per quod tempus canonica tenuit res de Gonfienti et res de Pantano

Here, the proposed lines of questioning reveal what we can presume was the collegiate church's basic theory of the case: that it had acquired good title to the property in dispute through a testamentary devise, and that its possession of the property since the conveyance had never been disturbed by the opposing party.

Such use of *tituli* to inform the court, tempering the informational advantage of the witness-producing parties, resulted in what was at best an uneasy compromise between party control and judicial control of the trial proceeding. As the author of *Invocato Christi nomine* makes clear, many parties likely resented judicial efforts to exploit, possibly to parties' disadvantage, the knowledge that parties had acquired in the pretrial. Their main fear was that their own witnesses could either be turned against them or mistreated by an opposing party. Thus one common procedural tactic, the author explains, is for parties producing witnesses to attempt to protect their own witnesses from their adversaries by refusing to propose questions in writing. They do so "because of the cunning of their adversaries, lest their adversaries contrive some scheme with their witnesses against their interest."[94] These parties instead "only speak words in the judge's ear, and if they cannot speak in his ear, they speak as best they can."[95] Another means of protecting witnesses from the opposing party is, the author

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et pro suo et sine molestia […]. Item, querite si Campiscana uel alius pro ea habuit predictarum rerum possessionem.").

[94] Wahrmund, *Quellen*, vol. 5.1, pt. 4, tit. 46 (*de iuramento testium*), at 111 ("Sed quandoque sibi cavent advocati, quod talem titulum non conficiunt, propter adversariorum calliditatem, ne aliquid contra hoc cum suis testibus machinentur.").

[95] Id. ("Sed verba solummodo dicunt iudici in aure, et si non possunt in aure, dicunt, ut melius possunt.").

says, "the custom in some places" of requiring that questions to be put to an adverse witness be put in writing, but not questions that a party wishes to be put to his *own* witness.[96]

In the view of the author of *Invocato Christi nomine*, such adversarial tactics must be suppressed to the greatest extent possible. One means of suppression was to require a maximum of party disclosure, providing each party with as much advance information as possible about the line of questioning that the opposing party wanted the judge to take with his own witnesses. As the author puts it, *omnia sunt edenda, quibus quis usurus est in iudicio* ("everything that anyone plans to use in a proceeding must be disclosed").[97] But the author also argues that a good judge must always assert control over the proceeding, moderating the adversarial tactics of the parties. He may use the parties' proposed questions for guidance, but should maintain his independence in conducting witness examination. A "good and discerning judge," the author explains, therefore "must first simply ask questions about what the witnesses know and wish to say on their own" instead of relying from the outset on the written questions proposed by the parties. Only after the judge has initiated an independent line of questions should he "later consider[] the writing" submitted by the witness-producing party. In going through the party-submitted questions, sometimes the judge may wish to "ask first about what is at the end" of the document; sometimes he may wish instead to start with "what is in the middle."[98]

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[96] Id. ("Item consuetudo est in quibusdam locis de tali titulo, ut, qui eum dat, ibi scribat, qualiter testes adversarii interrogentur, et non, qualiter sui.").
[97] Id.
[98] Id. ("Sed bonus et discretus iudex interrogando testes non debet inspicere ordinem scripture tituli, sed primum debet simpliciter interrogare de eo, quod testes sciunt et dicere volunt per se, et postea considerat scripturam. Et de eo, quod est in fine, interrogat prius et quandoque de eo, quod est in medio. Sicque subtiliter scrutatur omnia et inquirit, que testes dicunt, si possunt esse vera vel verisimilia; et comminatur testibus et reprehendit eos circa constantiam vel inconstantiam dictorum.").

The practice of using party-submitted written questions during the judge's examination of witnesses, first documented in *Invocato Christi nomine*, quickly became standard procedure in the thirteenth-century literature; most major *ordines* from the thirteenth century mention the practice at least in passing.[99] These *ordines* agree with the insistence of *Invocato Christi nomine* that the judge should control the examination of witnesses, questioning each witness alone. But they also reveal that the procedural writers were beginning to devise another means of exploiting the parties' knowledge about their witnesses while restraining procedural abuses. The primary new mechanism was the establishment of a link between the form of action used in a proceeding, on the one hand, and the parties' production of witnesses and *tituli* of proposed questions for witnesses, on the other hand.

A hint of such a linkage appears already in *Si quis vult alicui movere questionem*, an *ordo* from 1210–15. In discussing proof, the author observes that a party should present proof only "on those articles" (*super illis articulis*) of the pleadings that the opposing party has denied at the moment of joinder of issue.[100] The scope of proof, and consequently the scope of witness testimony, is thus circumscribed by the pleadings, whose *articuli* state a particular cause of action. The link is clearer in *Assiduis postulationibus me karissimi socii*, an *ordo*

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[99] There is also corroborating evidence from practice to show that *tituli* were in use in legal practice outside Tuscany already by the turn of the thirteenth century. For witness testimony from Genoa mentioning *tituli*, see, for example, M. W. Hall-Cole, H. G. Krueger, R. G. Reinert, and R. L. Reynolds, eds., *Giovanni di Guiberto (1200–1211)* (Genoa: R. deputazione di storia patria per la Liguria, 1939), no. 95, at 1:48–52; id., no. 101, at 1:62–65. For early thirteenth-century examples from Savona, see Dino Puncuh, ed., *Il cartulario del notaio Martino: Savona, 1203–1206* (Genoa: Società ligure di storia patria, 1974), no. 774, at 294–96; id., no. 776, at 297–98.

[100] Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 4, fasc. 4, *Die "Summa de ordine iudiciario" des Magister Damasus* (Innsbruck: Wagner, 1926), tit. 53 (*de probationibus*), at 38 ("Post iuramentum calumpniae, de quo supra proxime tractatum est, super illis articulis, quos negaverit reus, oportet actorem probationes producere […] et similiter reum, si aliquid obiecerit et illud negaverit actor […].").

composed by the prominent Bolognese jurist Tancredus, shortly after *Si quis vult alicui movere questionem*. Tancredus explicitly defines the proper scope of witness testimony in terms of the relevance of that testimony for the form of action that the plaintiff has brought. "The judge must question the witness diligently," Tancredus explains, "concerning all things that pertain to the cause [*faciunt ad causam*], so that through them he may better bring out the truth."[101]

A relevance-based limit on the questions that can be put to a witness, hinted at obliquely in *Si quis vult* and *Assiduis postulationibus*, is made more explicit in several *ordines* from a few years later in the thirteenth century, which discuss a more formalized practice surrounding the production and examination of witnesses.

One example is *Quoniam frequenter*, a Bolognese *ordo* plausibly composed during the pontificate of Innocent IV (r. 1243–54). Standard practice by those years, according to the author of *Quoniam frequenter*, called for a party, as soon as his opponent had produced witnesses, to "ask at once for the *intentio* [of the opposing party], which is made up in the following manner according to the tenor of the complaint: 'So-and-so intends to prove against so-and-so as follows.' And thus he says everything that he wants to prove according to what is contained in the complaint [*petitio*] and the form of action."[102] This *intentio* appears to be the functional equivalent of the *titulus* mentioned in *Invocato Christi nomine*. It

[101] Friedrich Christian Bergmann, ed., "Tancredi Bononiensis Ordo iudiciarius," *Pillii, Tancredi, Gratiae libri de iudiciorum ordine* (Göttingen, 1842), pt. 3, tit. 9 (*de iuramento testium, et qualiter sunt examinandi*), § 2, at 238 ("Interrogare debet iudex testem diligenter de omnibus, quae faciunt ad causam, per quae melius possit elicere veritatem […].").
[102] Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 1, fasc. 6, *Die* summa *des Magister Aegidius* (Innsbruck: Wagner, 1906), tit. 29 (*de productione testium*), at 9 ("Cum testes producuntur, adversa pars petit statim intentionem, quae sic fit secundum tenorem petitionis: *Talis intendit probare contra talem sic*. Et sic dicit omnia, quae probare vult, secundum quod in petitione vel actione continetur.").

gives notice to the opposing party of what the producing party intends to prove, and it gives guidance to the judge of how he should examine each witness. But unlike *Invocato Christi nomine*, *Quoniam frequenter* explicitly cabins the scope of witness examination within the bounds of the party's complaint and the form of action he has chosen; all questions asked of witnesses must be legally relevant. Indeed, in the same section of the text the author of *Quoniam frequenter* states an express principle of admissibility on the basis of legal relevance: "If [a party] should prove anything other than what is contained in the *intentio*, [the proof] is invalid."[103]

More extensive discussion of the same moment in the proceeding can be found in *Cum advocationis officium*, an *ordo* composed by the canon law professor Bonaguida of Arezzo around the same time as *Quoniam frequenter*, during the pontificate of Innocent IV or within a few years afterward. Bonaguida describes a procedure in which, once production of witnesses has taken place, each party is given a certain period of time to submit proposed lines of question to the judge or other court officer assigned to examine the witnesses. First the producing party must file his "intention, or […] articles, or headings, on which the witnesses should testify." The opposing party then has the right to frame his own written *titulus* or *interrogatorium* of questions for the adverse witnesses.[104] In the absence of any possibility of true cross-examination, since the entire examination is conducted by the court, Bonaguida instead offers the advocate for the opposing party strategies for interpreting the producing party's *intentio* and preparing a set of questions in opposition. He advises counsel

[103] Id. ("Item nota, quod si aliud quam in intentione contineatur probaret, non valet.").
[104] Agathon Wunderlich, ed., "Bonaguidae Summa introductoria super officio advocationis in foro ecclesiae," in *Anecdota quae processum civilem spectant* (Göttingen, 1841), pt. 3, tit. 7 (*de titulo sive interrogatorio faciendo extra testes*), at 282 ("Data intentione, sive datis articulis, seu capitulis, super quibus testes debeat deponere, sicut supradictum est, petet ille, contra quem inducuntur, terminum ad faciendum titulum sive interrogatorium suum contra testes.").

for the opposing party when framing his own proposed questions "to have the *intentio* or written articles [of the producing party] before his eyes […] and to gaze into them as though into a mirror," inferring from the written questions "the movement of his [opponent's] mind."[105]

Read together with the corresponding passages of *Invocato Christi nomine* and *Quoniam frequenter*, this discussion of *intentiones*, *tituli*, and *articuli* in *Cum advocationis officium* shows the increasing formalization of the practice of submitting written questions for the witnesses in advance. This increasing formalization runs in parallel, moreover, with another trend visible in *Cum advocationis officium*: an increasingly elaborate discussion of admissibility of individual questions to put to the witnesses. The author of *Invocato Christi nomine* had discussed a relatively informal practice of submission of written questions by the parties and had urged the judge not to rely slavishly on the parties' submissions when examining witnesses, but he had made no mention of principles of admissibility. Bonaguida, by contrast, describes a highly formalized procedure in which each party must submit written questions and those questions are then screened for legal relevance in relation to the plaintiff's pleadings and chosen form of action.[106] Bonaguida mentions relevance as a criterion for admissibility of questions to a witness when he discusses the requirement that a

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[105] Id. at 284 ("Primo notandum est, quod ipse advocatus in confectione tituli ante oculos debet habere intentionem sive articulos scriptos, quos adversarius per testes suos probare intendit, et illos tanquam speculum intueri, ut ex illis informet motum sui animi ad titulum ordinandum […].").

[106] Bonaguida even suggests language that counsel for the defense can use if necessary to request a copy of the plaintiff's *intentio*: "Moreover, the adversary insists in opposition: 'Lord judge, please have the *intentio* given to me, so that I can make up a *titulus* against the witnesses whom [my opponent] wishes to present against me." Id., tit. 5 (*de articulis sive capitulis per testes probandis*), at 275 ("Item ex adverso adversarius instat: Domine judex, faciatis mihi dari intentionem, ut possim facere titulum contra testes, quos vult inducere contra me. Et ita oportebit eum dare intentionem sive articulos, seu capitula, quae vult probare.").

party producing witnesses submit proposed "intentions" or "articles" for the examination of the witnesses. The requirement exists, Bonaguida says, in part to give notice to the opposing party "in order that he […] may be informed as to how he should make up his *interrogatorium* or *titulus* against [the producing party's] witnesses."[107] But written "intentions" are also required, according to Bonaguida, so that the judge can determine in advance whether and on what issues a given witness will provide legally relevant testimony.[108] Similarly, the written questions of the opposing party must also be checked to ensure that they do not contain "some questions not relevant to the case" (*aliquae interrogationes non pertinentes ad causam*).[109] Moreover, in addition to the criterion of relevance, a criterion of non-superfluousness is also stressed in *Cum advocationis officium*: "And if in the *titulus* there are any superfluous questions […] the judge must then say something along these lines, 'Why are these taking up parchment space?' […] And he must cut the superfluous items out, since superfluous things must be cut out […]."[110]

Related criteria of admissibility are set forth in one other *ordo* from the middle years of the thirteenth century, *In nomine Domini nostri*, a practically oriented procedural manual composed by the Bolognese canon lawyer Aegidius de Fuscarariis in the 1260s. For the party who is producing witnesses, Aegidius does not give specific guidance about the formulation of proposed questions for the witnesses; he does indicate, however, that the party must draft an *intentio*—a document listing the propositions that the party intends to prove and serving as

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[107] Id. at 276 ("Edit articulos secundo, ut ille, contra quem producuntur testes, instruatur, qualiter faciat suum interrogatorium sive titulum contra testes.").
[108] Id. at 275 ("Edit articulos primo, quos per testes probare intendit ideo, ut videat judex, utrum super hoc, quod vult inducere, testes debeant recipi.").
[109] Id., tit. 7 (*de titulo sive interrogatorio faciendo extra testes*), at 285.
[110] Id. ("Et si in titulo inveniantur aliqua supervacantia […] debet tunc dicere judex, ut quid haec membranas occupant? […] Et tales superfluitates debet resecare, quia superflua sunt resecanda […].").

a basis for witness examination—that consists only of legally relevant factual allegations. Among other examples, Aegidius gives the case of a woman who wishes to prove that a valid marriage exists between her and her alleged husband. The jurist explains that the woman might formulate her *intentio* as follows: "Bertha intends to prove that so-and-so said that he wanted her to be his wife, and that she herself immediately responded that she wanted him to be her husband. Further, that mutual present consent was exchanged between them. Further, that concerning everything aforesaid there is and was public fame before this litigation was begun."[111] Aegidius backs up his model *intentio* with references to the *Liber Extra* for each proposition, showing that each allegation to be proved is legally relevant to the form of action being brought by the woman.[112]

For the opposing party, meanwhile, Aegidius explains that *interrogatoria* of proposed questions for adverse witnesses should be submitted in writing. The *interrogatorium* of the opposing party, like the *intentio* of the producing party, is regulated by a principle of relevance. The questions proposed in the *interrogatorium*, the jurist stresses, must be relevant to the action brought by the plaintiff; that is to say, they must cover the subject matter that "is contained in the *intentio* of [the producing party]." If the opposing party's proposed questions are "irrelevant"—that is, if they range beyond the *intentio*—they are deemed "not valid," and

[111] Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 3, fasc. 1, *Der* ordo iudiciarius *des Aegidius de Fuscarariis* (Innsbruck: Wagner, 1916), tit. 53 (*qualiter actor debeat formare intentionem suam sive capitula, quae probare intendit*), 102 ("Intendit probare Berta, quod talis dixit, quod volebat eam in suam uxorem, et ipsa respondit in continenti, quod volebat ipsum in suum virum. Item, quod inter ipsos intervenit consensus mutuus de praesenti. Item, quod de praedictis omnibus est et fuit publica fama ante litem motam.").

[112] See id. ("Et isti articuli probantur Extra, de maioritate et obiedientia, hiis, quae [X 1.33.11] et de capellis monachorum, dilectus [X 3.37.2] et Extra, de testibus, c. praesentium, Innocentii IIII [VI 2.10.12].").

the judge must reject them.[113] Similarly, like Bonaguida, Aegidius instructs the judge to exclude any proposed questions that are "superfluous," explaining that some parties try to confuse witnesses unfairly with irrelevant or unnecessary questions.[114]

Aegidius illustrates this discussion of *interrogatoria* with several examples, including a lengthy model set of questions that an opposing party could submit to the judge for questioning an adverse witness in the marriage case of Bertha. A properly drafted *interrogatorium* in Bertha's case might begin as follows, according to the jurist:

> The lawyer will then draft his own *interrogatorium* as follows: "Let the witnesses produced against [alleged husband] M. be asked, for any given article of his testimony concerning the reason, the place, the boundaries of the place, the time, what was heard, what was seen, [the witnesses'] knowledge, [the witnesses'] belief, public fame, and all circumstances that can and should move the mind of the adjudicator toward rendering sentence." The witnesses should also be asked such things as the law states and directs.[115]

After this initial set of general instructions listing the different genera of subject matter that the examiner should pursue during interrogation (*causa*, *locus*, *tempus*, and so forth), a long series of more specific questions based on the producing party's *intentio* should then follow,

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[113] Id., tit. 55 (*qualiter debeant interrogatoria testium formari*), at 104 ("Nam si super aliis formaret interrogatorium suum, quam contineatur in intentione adversarii, non valeret, nec iudex deberet quaerere de hiis, nec dictum testis valeret, si super alio articulo deponeret, quia deponeret non iuratus, Extra, de testibus, c. de testibus [X 2.20.29]. Nec debet iudex facere interrogationes impertinentes, sed debet eas eicere; et ideo debet examinare interrogatoria.").
[114] Id., tit. 56 (*qualiter advocatus formare debeat interrogatoria testium*), at 107 ("Si autem viderit, aliqua interrogatoria non esse facienda, quia impertinentia vel superflua sunt, deliberatione habita cancellabit ea, quia quidam sunt, qui malitiose faciunt interrogatoria, ut dicta testium, etsi veritatem deponant, possint ad nichilum deducere.").
[115] Id. at 105 ("Formabit autem advocatus sic suum interrogatorium: 'Quaeratur a testibus productis contra M. super quolibet articulo sui dicti de causa, de loco, de finibus loci, de tempore, de auditu, de visu, de scientia, de credulitate, de fama et de omnibus circumstantiis, quae possunt et debent movere animum iudicantis ad sententiandum.' Et quae iura dicunt et decernunt, quaerendum est, a testibus.").

according to Aegidius. These questions cover more specific *species* of issue that arise under each *genus*, the jurist says:

> And afterward he should descend in the following manner to the species: "If the witness says that Bertha contracted marriage with Titius, he should be asked on that article: how does he know this, by sight or by hearsay? And if he says, by sight, questioning should continue on that article: in what place did he see this, inside a house or outside a house? And if he says, inside a house, he should be asked, in which part of the house? Also, whether that house has a balcony, is on the ground. Also about the neighborhood of the house. Also, if he says that the house has a balcony, he should be asked whether the marriage contract was entered into under the balcony or on it. Also, he should be asked about those who were present, and whether many whom he could name were present. Also, whether the contracting parties stood or sat. Also, what clothes were they wearing? Also, he should be asked, by what words did they contract marriage? Also, who asked first, the woman or the man? Also, whether the question and reply were made in a single instant. Also, whether they made this marriage with the intent of contracting marriage, or with the intent of extorting carnal relations or the intent of kissing. Also, was there any fear or coercion during the making of the contract, or [was it done of the parties'] free will? Also, was the marriage contract spoken once, or several times? Also, how long ago did it take place: which year, month, day, and time of day? Also, who was *podestà* of Bologna at the time? Also, if he says that it was ten years ago, he should be asked, how does he know? Also, did he know the contracting parties back then, and if so, how did he know them? Also, was he asked to come to see it taking place? Also, did some prior discussion precede those words of contracting marriage? Also, did he himself know there and then that there was some impediment [to a valid marriage]? Also, how much [M.] had in property. Also, how old [was he]? Also, did he arrange with the other witnesses that he should testify thus? Also, was anything promised or given to him so that he would testify thus? Also, does he hope for some compensation from this case if the party who produced him loses it? Also, is he an enemy of the party against whom he is being produced? Also, is there some criminal dispute between him and the party against whom he is now testifying?[116]

[116] Id. at 105–6 ("Si testis dixerit, quod Berta contraxerit matrimonium cum Titio, quaeratur super isto articulo, quomodo scit hoc, utrum ex visu vel auditu? Et si dixerit: de visu, procedatur super isto articulo, in quo loco vidit hoc, utrum in domo vel extra domum? Et si dixerit: in domo, quaeratur, in qua parte domus? Item utrum illa domus sit balconata vel in terra? Item de confinibus domus. Item, si dixerit, quod domus sit balconata, quaeratur, utrum contractum fuerit sub balcono vel supra? Item quaeratur de praesentibus, et utrum interfuerint

This long series of proposed questions is not even the end of Aegidius's example *interrogatorium*. The example text continues with alternative questions to be asked in the event that the witness responds that the events in question took place *outside* a house, or if the witness responds that he had only *heard* about the wedding from others, not *seen* it himself. What is clear, however, is the great detail and wide range in which Aegidius expected that parties' *interrogatoria* would be written. The principles of admissibility that Aegidius discusses serve as checks on this otherwise wide-ranging power of the parties to frame witness questions about seemingly any circumstance, no matter how minor, surrounding a case.

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We now have seen in this chapter a subtle shift in the balance of procedural power between adjudicator and parties over the course of the late twelfth and early to mid-thirteenth centuries. The procedural writers of the twelfth century, up until the time of *Invocato Christi nomine*, described (or at least implied) a procedure in which the parties controlled the production of witnesses, but the judge held full control over their examination. One sees in

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plures, qui nominentur per eum. Item utrum contrahentes starent vel sederent? Item quibus vestimentis erant induti? Item quaeratur, per quae verba contraxerunt? Item quis primo quaesivit, utrum mulier vel vir? Item si uno instanti interrogatio et responsio facta fuit? Item si animo contrahendi matrimonium hoc fecerunt vel animo extorquendi carnalem copulam vel osculandi. Item si interfuit aliquis metus vel aliqua coactio in contrahendo vel sponte? Item si semel contractum fuit dictum matrimonium vel pluries? Item quantum tempus est, quod hoc fuit; quo anno, quo mense, quo die, qua hora diei? Item quis erat tunc Potestas Bononiae? Item si dixerit, quod sunt decem anni, quaeratur, quomodo scit? Item si cognoscebant tunc contrahentes et quomodo cognoscit? Item si fuit rogatus, ut veniret ad videndum, quod fiebat? Item si prius aliquis tractatus praecesserat illa verba de matrimonio contrahendo? Item si ipse sciebat, tunc ibi esse aliquod impedimentum? Item quantum habeat in bonis? Item cuius aetatis? Item si concordavit cum aliis testibus, ut sic diceret? Item si sperat dampnum de ista causa, si ille, qui ipsum induxit, perdiderit eam? Item si est inimicus illius, contra quem producitur? Item si est aliqua causa criminalis inter ipsum et illum, contra quem modo deponit?").

this procedure a natural tension between the *pretrial*—controlled by the parties, who were free to select and prepare witnesses for production—and the *trial*—controlled by the court, which was responsible for examining the witnesses whom the parties had produced but which must inevitably have known less about the witnesses than the parties. The tension was resolved in practice toward the end of the twelfth century by ceding a measure of power over examination to the parties. Starting in *Invocato Christi nomine* and continuing into the thirteenth century, we saw the introduction and gradual formalization of a practice in which the judge would rely on the parties themselves for questions to be put to the witnesses.

This shift of procedural power was followed, moreover, by a similarly subtle shift in the law of witnesses in the doctrinal literature of the thirteenth century. As we saw in the first three parts of this chapter, the twelfth-century law of witnesses relied largely on rules of disqualification, and to a lesser extent rules of proof sufficiency, to regulate witness testimony. The individual questions put to witnesses and the content of the witness testimony itself, by contrast, were subject to little or no formal regulation. As we have seen, such a regime—in addition to being sanctioned by ample authority in the *Corpus iuris* and *Decretum*—would have been well suited to an examination procedure from which the parties themselves were excluded. If the parties could not intervene effectively in the examination itself, they were best off trying to prevent adverse witnesses from testifying altogether, or at the very least to impugn witnesses' testimony after the fact. But once court practice allowed the parties to penetrate into the examination itself, by submitting written *intentiones*, *articuli*, *tituli*, and *interrogatoria* with proposed questions for favorable and adverse witnesses, we begin to see a corresponding change in the law. This change took the form of the emergence of a relevance-based principle of admissibility governing individual questions, soon followed

by a principle of admissibility based on the materiality of a given question to the outcome of a case—that is, whether the question was "superfluous" or not.[117]

One observes immediately that these admissibility principles are much sparer than their counterparts in the thirteenth-century law of positions. Many grounds for exclusion of certain interrogations and positions that we saw in chapter three are absent from the thirteenth-century procedural writers' discussion of the law of witnesses. There is, for example, no rule prohibiting a question that could lead a witness to contradict himself. Nor is there any rule, to give another example, against questions that might lead witnesses to admit to past crimes. One finds instead only the two prohibitions against irrelevant (*impertinentes*) and immaterial or redundant (*superfluae*) questions. Why this difference?

I have argued in both this and the previous chapter that the textual basis for creating rules of admissibility of the type found in the law of positions, and now also in the thirteenth-century law of witnesses, was not strong. There is a fortiori little reason to think that the difference between admissibility in the law of positions and admissibility in the law of witnesses can be explained by reference to the texts of the *Corpus iuris* and the *Decretum*.

Nor does any nontextual cultural explanation immediately suggest itself for the difference. Certain mentalities of the high Middle Ages, particularly those concerning the relationship between a person's social status and his or her testimonial credibility, might well have been conducive to the flourishing of rules of witness qualification; however, it is

[117] The functionalist account of this area of the law of witnesses that I am proposing here is by no means incompatible with the theory of Alessandro Giuliani explaining the relevance principle as a product of the influence of the theory of *status* from the ancient rhetorical tradition. See Alessandro Giuliani, "Articulus impertinens non est admittendus," in *Estudios juridico-sociales: Homenaje al profesor Luis Legaz y Lecambra* (Zaragoza: Universidad de Santiago de Compostela, 1960), 1:426–27. My account here, like my account in chapter 3, supposes that the jurists drew on the intellectual resources that were available to them in order to resolve the problems created by structural features of Roman-canon procedure.

difficult to see why such mentalities would have excluded the use of rules of admissibility of the type under discussion here.

The most plausible explanation for the difference between the law of positions and the law of witnesses is instead, again, a functionalist one. As I have argued in the previous chapters of this dissertation, the thirteenth-century jurists developed rules of admissibility in order to mitigate the potential for abuse of positions. The rules served as a check on the power of one party to force the opposing party to answer about matters unrelated to the litigation, or to confuse or exhaust the opposing party with a torrent of repetitive positions, or to trick the opposing party into inadvertently contradicting or perjuring himself. The rules of admissibility devised for the law of witnesses served an analogous function. But if the rules of admissibility in this latter area of law were less developed, it was likely because the procedural contexts of positions and witnesses were quite distinct. Both parties were present with their advocates for the exchange of positions and responses. By contrast, during witness examination, as we have seen, only the judge and a notary were present as a rule. Once a measure of control over witness examination—specifically, control over the formulation of questions for witnesses—was ceded to the parties in the late twelfth century, the procedural writers began to formulate explicit principles of admissibility. These principles regulated the admissibility of party-submitted witness questions; in so doing, they mediated the power relations among the different actors in the procedure. But witness examination, unlike positions and responses, was still conducted outside the presence of the parties. The absence of the parties from the examination room likely hindered the elaboration of rules, either because it was more difficult for the parties to raise and develop their objections before the judge in real time, or because in the absence of the parties the judge could exercise a greater measure of discretion as to the questions asked.

Nevertheless, notwithstanding these differences, and whatever their cause, the rules of admissibility in the thirteenth-century law of positions and the analogous rules in the thirteenth-century law of witnesses also show important functional similarities. I suggested in the previous chapter that two main motives for rules of admissibility were implied by the jurists' writing on positions, both arising from the prominent role in fact finding that the parties played in Roman-canon civil procedure. One motive, I suggested, was coordination of fact finding: to coordinate more efficiently the "demand" for information from the fact finder with the "supply" of information from the parties. Another motive was protective: to protect one trial participant from abusive questioning from another participant. Both of these motives also implicitly undergird the norms of relevance and non-superfluousness that the jurists develop in the context of the law of witnesses.

The coordination motive is suggested, I would argue, by Bonaguida's discussion of witness-question *tituli* in *Cum advocationis officium*. The judge in Bonaguida's account must review parties' proposed questions for relevance to the case in order to determine, among other things, whether he needs to question a given witness in the first place, and if so, on exactly what issues. The exasperated question of a hypothetical judge that Bonaguida uses to illustrate the principle of non-superfluousness—" 'Why are these taking up parchment space?' "—similarly suggests that one purpose of the rules of admissibility was to mediate between the judge's informational needs and the information production of the parties.

The protective motive is not directly attested in the sources on witnesses, unlike the sources on positions. Nonetheless, I think that it may well be implicit in the jurists' discussions of admissibility of witness questions. When the author of *Invocato Christi nomine* writes of parties' fear of their adversaries' "cunning," their unease about disclosing

proposed lines of inquiry lest their opponents "contrive some scheme" to abuse or suborn their witnesses, we can see, I think, a protective motive underlying the rules of admissibility. Formal rules of admissibility, by cabining the scope of inquiry, at least theoretically offered a means of reducing the potential for inappropriate questioning of adverse witnesses.

What we find in the law of witnesses, then, offers a parallel for our account of the emergence of rules of admissibility in the law of positions.

5. CONCLUSION

In this final chapter I have sought to broaden our perspective on the law of positions by drawing a comparison to another area of Roman-canon procedure, the law of witnesses. I began by characterizing the law of witnesses in the second half of the twelfth century as relying primarily on principles of witness qualification, and to a lesser extent on a nascent two-witness rule of proof sufficiency, in order to regulate witness testimony. I argued that the particular form that the law of witnesses took in the twelfth century can be explained partly as a result of textual and cultural influences, but partly also as a response to structural incentives. Rules of admissibility of the type later found in the law of positions would have served little purpose for most of the twelfth century, I suggested, because examination of witnesses was entirely or almost entirely within the control of the court, not the parties.

After this introduction, I then described a development—visible in procedural manuals from the end of the twelfth century and from the thirteenth century—in which courts began to formalize a practice of allowing, or even requiring, the party producing witnesses and the opposing party to submit written lines of questioning to be put by the judge to the witnesses. This development, which I suggested was a natural means of resolving the structural tension between the party-controlled pretrial production of witnesses and the judge-

controlled examination of witnesses, ceded a measure of control over the examination of witnesses from the court to the parties. I argued that the resulting shift in the balance of procedural power between the judge and the parties in turn created an incentive for the formulation of basic principles of admissibility analogous to those found in the law of positions. I also argued that the lesser degree of elaboration of these principles, as compared to their counterparts in the law of positions, is best explained by the fact that parties in the thirteenth century were not permitted to be present during the examination of witnesses; this fact lessened the incentive for doctrinal elaboration of explicit rules. I have nonetheless stressed in this chapter the basic parallelism between the rules of admissibility in the law of positions and the rules of admissibility in the law of witnesses.

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The account I have outlined in these chapters to explain the emergence of rules of admissibility in Roman-canon procedure can perhaps be summarized, if only speculatively, in the form of a general theoretical observation. Significant late twentieth-century scholarship on the law of evidence has identified party control over the conduct of trial as one of several explanations for the Anglo-American rules of evidence. For Mirjan Damaška, writing from a synchronic perspective, the Anglo-American "adversary system"—"a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essentially passive"[118]—constitutes one of three explanatory "pillars" of the law of evidence, along with the division of the trial court into judge and jury and the temporal concentration of Anglo-

[118] Mirjan R. Damaška, *Evidence Law Adrift* (New Haven, Conn.: Yale Univ. Press, 1997), 74. For other expressions of a party-control theory of the law of evidence, see Edmund Morgan, "The Jury and the Exclusionary Rules of Evidence," *University of Chicago Law Review* 4 (1937): 247; Dale Nance, "The Best Evidence Principle," *Iowa Law Review* 73 (1988): 227, 229, passim.

American trials. For John Langbein, writing from a historical perspective, the form of "adversary procedure" that arose after the introduction of lawyers into the English criminal trial in the eighteenth century "pressured the judge toward passivity and broke up the older working relationship of judge and jury."[119] With the judge no longer actively managing the presentation of information to the jury, formal rules of evidence were now needed to regulate the flow of information from the parties to the fact finders, above all testimony produced by the examination and cross-examination of witnesses.[120]

The analysis of Roman-canon procedure that I have presented in these chapters is in part simply a corroboration of these accounts from a comparative perspective. In twelfth- and thirteenth-century Roman-canon procedure, as in eighteenth-century English procedure, rules regulating the admissibility of evidence arose as a result of a rebalancing of the relative control exercised by parties and adjudicators in the fact-finding process. The law of positions emerged after adjudicators had begun to allow, and possibly to require, parties to examine their opponents for factual evidence. Principles regulating the admissibility of questions put to witnesses emerged in the law of witnesses after adjudicators had begun to cede some power over witness examination to the parties, who were now permitted to frame questions both for their own and for adverse witnesses. Indeed, the very differences between the law of positions and the law of witnesses highlight the significance of party control as a causal precipitant. The sparseness of the principles of admissibility in the law of witnesses as compared to the law of positions likely reflects at least in part the greater measure of control

[119] John H. Langbein, "The Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review* 96 (1996): 1198.
[120] See generally id. at 1168–1202; John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford Univ. Press, 2003), 178–251.

that the adjudicator or another court official, who continued to question witnesses in secret, retained over the examination.

But the analysis I have offered here may offer not only corroboration, but also some additional insight into the structural determinants of evidentiary rules. All accounts of the Anglo-American law of evidence—even those that, like the accounts of Damaška and Langbein that I have mentioned, point up the significance of party control—invariably face the question of the relative significance of the jury for the structure of the rules.[121] By contrast, twelfth- and thirteenth-century Roman-canon procedure provides a historical example of a procedure at its formative stage that is adversarial, but nonjury. It suggests that in a procedure in which adversarialism is a significant factor, but temporal concentration and the requirement of jury control are not, certain minimum rules of evidentiary admissibility may still play an important role: in particular rules that allow for the coordination of fact-finding "demand" and "supply" between the adjudicator and the parties, as well as rules that attempt to shield parties from abusive conduct of their opponents. As scholars of the Anglo-American law of evidence look for answers to the question of how, if at all, the rules of

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[121] Among historical accounts, the point of departure is James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, 1898), 2 ("It is this institution of the jury which accounts for the common-law system of evidence […]."); see also id. at 509 ("[O]ur law of evidence is a piece of illogical, but by no means irrational patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system […]."). Langbein has offered the principal revisionist historical account. Major challenges to the theory of jury control as the normative justification for the rules of evidence include those of Damaška, who has identified party control and the concentration of trial within a compressed time frame as separate factors explaining the rules; Edmund Morgan, who pointed out the significance of extrinsic policy considerations underlying the rules; and Frederick Schauer, who has argued that the major exclusionary rules are justified as restrictions on fact finding whether or not the fact finder is the jury. See Damaška, *Evidence Law Adrift*, 58–124; Edmund M. Morgan, "The Jury and the Exclusionary Rules of Evidence," *University of Chicago Law Review* 4 (1937): 247–58; Frederick Schauer, "On the Supposed Jury-Dependence of Evidence Law," *University of Pennsylvania Law Review* 155 (2006): 165–202.

evidence could or should be adapted to account for the decline of the jury, historical case studies such as the one presented here can show contemporary scholars a broader range of possible institutional arrangements and the conditions under which those arrangements are likely to emerge.[122]

[122] Cf. Adriaan Lanni and Adrian Vermeule, "Constitutional Design in the Ancient World," *Stanford Law Review* 64 (2012): 909 (justifying a survey of schemes of constitutional design in Mediterranean antiquity on the grounds that "the ancient world suggests institutional possibilities that have been neglected by the modern world, and offers some evidence about the conditions under which those possibilities might prove useful").

APPENDIX

NOTES ON THE THIRTEENTH-CENTURY *TRACTATUS DE POSITIONIBUS*

This appendix discusses the monograph treatises (*tractatus*) on the law of positions that survive from the thirteenth century. To sum up the main results: approximately ten thirteenth-century monograph texts survive. The earliest possible date of composition of any of the texts was in the early 1230s, whereas the latest text dates from about the end of the thirteenth century.

1. *De positionibus intendentes* (before ca. 1245?). This short treatise on the law of positions appears only in the fourteenth-century manuscript Paris, Bibliothèque nationale de France, MS lat. 3990C, fol. 264va–vb [hereinafter BnF lat. 3990C]. The treatise describes briefly what a position is (*quid sit positio*), in what form a position should be formulated (*quibus uerbis sit facienda*), when during a proceeding positions should be presented (*quando positiones sint faciende*), and which types of position are inadmissible (*que non sint admittende*).

Unfortunately, the text offers almost no clues of authorship and date. The only thing to be said for certain about the author is that he was a legist, since the text refers exclusively to the *Corpus iuris*. As for the date of the text, the absence of any citations of papal decretals makes it impossible to fix a definite chronology, but it is at least likely that the treatise was composed before about 1245, the year in which Pope Innocent IV issued the decretal *Statuimus* (VI 2.9.1) at the First Council of Lyon. In that decretal, Innocent IV held that positions asserting negatives were in some cases admissible. In this treatise, by contrast, the author asserts that negative positions are not admissible, although the judge himself, acting

on his own motion, is allowed to put questions about negatives to the parties.[1] It is possible that the author composed his treatise after 1245 but was unaware of Innocent IV's decretal, or that the author was aware of the decretal but simply chose to stay with the contrary position. But since the doctrine generally shifts after 1245 in favor of allowing negative positions in at least some circumstances, it is somewhat more likely that *De positiones intendentes* was composed before the issuance of the decretal.

2. *Positiones succedunt in locum probationum* (1234–45). A *Tractatus positionum* (opening words of the treatise: *positiones succedunt in locum probationum*) attributed to the thirteenth-century legist Martinus de Fano was dated by Ugo Nicolini on the basis of citations of canon law in the text to between 1234 (date of the *Liber Extra*) and 1245 (date of *Statuimus*).[2] Nicolini produced an edition based on the version of the text in Bologna, Biblioteca comunale dell'Archiginnasio, MSS B 2794–2795, fols. 104va–105rb [hereinafter Bologna B 2794–2795].[3] Substantially the same text is also reported in Rome, Biblioteca Casanatense, MS 1094, fols. 181va–182ra [hereinafter Casanatense 1094].[4] Bologna B 2794–

[1] BnF lat. 3990C, fol. 264va ("Item similiter de negatiua non uidetur ponere, cum probari non possit ea que sunt possibilia et que sunt probabilia, cum in locum probationum iste interrogationes sunt inducte, ut in aut. de hiis qui ingrediuntur ad appellationem § finali; tamen iudex debet querere sine positione querentis quando sibi uideatur, ut ff. de interrogatoriis actionibus l. penultima.").
[2] See Ugo Nicolini, ed., *Trattati "De positionibus" attribuiti a Martino da Fano: In un codice sconosciuto dell'Archiginnasio di Bologna (B 2794, 2795)* (Milan: Vita e pensiero, 1935), 55–60.
[3] Id. at 67–78.
[4] Gero Dolezalek also reports Córdoba, Biblioteca Capitular de la Catedral, MS 150, fols. 6vb–8vb; Leipzig, Universitätsbibliothek, MS 943, fols. 61v–62r. See Gero Dolezalek, "La diffusione manoscritta delle opere di due maestri aretini del Duecento: Bonaguida d'Arezzo e Martino da Fano," in *750 anni degli statuti universitari aretini: Atti del convegno internazionale su origini, maestri, discipline e ruolo culturale dello "Studium" di Arezzo, Arezzo, 16–18 febbraio 2005*, ed. Francesco Stella (Florence: SISMEL, 2006), 137.

2795 is from the end of the thirteenth or the beginning of the fourteenth century, whereas Casanatense 1094 is from the thirteenth century.[5]

In addition to the standard version of the text, two variant versions of *Positiones succedunt in locum probationum* exist. One is transmitted only in the thirteenth-century manuscript Gdańsk, Biblioteka Gdańska Polskiej Akademii Nauk, MS Mar. F. 77, fol. 223ra–rb [hereinafter PAN Mar. F. 77]; the other only in the fifteenth-century manuscript Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 11605, fols. 136va–140ra [hereinafter Vat. lat. 11605].[6] Both PAN Mar. F. 77 and Vat. lat. 11605 diverge from the Bologna B 2794–2795 and Casanatense 1094 texts at around the end of page 76 in Nicolini's edition of the treatise. PAN Mar. F. 77 and Vat. lat. 11605 thereafter initially report the same text, before then diverging from one another. PAN Mar. F. 77 goes on at fol. 223rb to discuss circumstances under which witness testimony is admissible after positions, whereas Vat. lat. 11605 at fols. 137vb–138ra discusses other issues, including types of positions that are inadmissible and the use of questioning by the judge to investigate a case further.

Although PAN Mar. F. 77 contains no attribution, the version in Vat. lat. 11605 appears under the name of the mid-thirteenth-century jurist Albertus Galeottus, who is credited in both incipit and explicit. These attributions are probably false. They are, admittedly, not entirely implausible. Galeottus was active around the middle of the thirteenth century and thus in principle could have reworked part of the treatise attributed to Martinus

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[5] See Nicolini, *Trattati*, 9.

[6] See Otto Günther, *Die Handschriften der Kirchenbibliothek von St. Marien* (Danzig: Kafemann, 1921), 97; José Ruysschaert, *Codices Vaticani Latini: Codices 11414–11709* ([Vatican City]: Biblioteca apostolica vaticana, 1959), 391. I exclude from consideration a *Tractatus positionum et iuramenti de calumpnia* attributed to the fourteenth- and early fifteenth-century civilian Bartholomaeus de Saliceto that appears in Vat. lat. 11605 at fols. 138ra–142ra, as it falls outside the temporal range of this dissertation.

within a few years after it was written.[7] He also wrote extensively on questions of procedure. William Durant the Elder borrowed from his work for his own *Speculum iudiciale*, and Jacobus de Arena even cites a work of Galeottus *de positionibus* in his own writing on the law of positions.[8]

Two considerations weigh against an attribution to Galeottus, however. One is the apparent redundancy of a separate treatise on positions under his name. Galeottus is already known to have composed a relatively self-contained chapter on the law of positions as part of a larger work, the so-called *Margarita*.[9] That chapter bears no obvious relation in content or style to the text in Vat. lat. 11605. The other is that whereas Galeottus's writing generally makes sparse reference to canon law, the text in Vat. lat. 11605 cites the *Liber Extra* extensively.

We are thus left with a plausible, though conjectural, attribution of at least one version of the *Positiones succedunt in locum probationum* to Martinus de Fano, but no fully reliable attribution of any version to any author. For the date of composition, however, Nicolini's proposed range of between 1234 and 1245 remains convincing for all versions of the treatise. The extensive citation of the *Liber Extra* in all versions of the treatise makes 1234 a definite *terminus post quem*. Twelve forty-five, the year in which Pope Innocent IV issued the decretal *Statuimus*, remains a reliable *terminus ante quem*, since the version of the treatise in Vat. lat. 11605 asserts categorically that negative positions are inadmissible. Nicolini showed

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[7] See Roberto Isotton, "Galeotti, Alberto," in *Dizionario biografico degli giuristi italiani (XII–XX secolo)*, ed. Italo Birocchi et al. (Bologna: Il mulino, 2013), 1:929.
[8] See Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. 5, *Das dreizehnte Jahrhundert*, 2nd ed. (Heidelberg, 1850), 528–30, 533.
[9] See id. at 533; *Aurea margarita ac pene divina D. Alberti Galeotti Parmensis* […] (Cologne, 1595), cap. 18 (*De positionibus, earum forma, admissione et reiectione*), at 100–103.

convincingly that language in Bologna B 2794–2795 permitting negative positions is a later interpolation.[10]

3. *Cum frequens et cotidianus* (first recension 1234–ca. 1243; second recension ca. 1250–86) and associated texts. A family of thirteenth-century treatises centers on twenty manuscripts containing some form of a treatise on positions that begins with the incipit *Cum frequens et cotidianus* or a close variant[11]:

(1) Bologna B 2794–2795, fols. 103va–104rb (incipit *Quoniam frequens et cotidianus*);

(2) Bruges, Hoofdbibliotheek Biekorf, MS 381, fols. 32va–34va [hereinafter Bruges 381];

(3) Córdoba, Biblioteca Capitular de la Catedral, MS 94, fols. 153rb–157va [hereinafter Córdoba 94];

(4) Durham, Cathedral Library, MS C.III.12, fol. 160va–vb [hereinafter Durham C.III.12];

(5) Klagenfurt, Archiv der Diözese Gurk, Bischöfliche Mensalbibliothek MS XXIXa10, fols. 72vb–75va (incipit *Cum frequens et assiduus*) [hereinafter Klagenfurt XXIXa10];

(6) London, British Library, MS Arundel 459, fols. 90vb–91vb [hereinafter BL Arundel 459];

(7) Madrid, Archivo Histórico Nacional, Sección de códices y cartularios, MS 975 B, fols. 5vb–6rc [hereinafter Madrid 975 B];

(8) Paris, BnF lat. 3990C, fols. 264vb–266ra. (incipit *Cum frequens et assiduus ac cotidianus*);

(9) Paris, Bibliothèque nationale de France, MS lat. 4604, fol. 85ra–rb [hereinafter BnF lat. 4604];

[10] See Nicolini, *Trattati*, 57–60; Vat. lat. 11605, fol. 137vb.
[11] In setting up this list I relied on the *Manuscripta juridica* data base, on Thomas M. Izbicki, "Problems of Attribution in the *Tractatus universi iuris* (Venice 1584)," *Studi senesi*, 3rd ser., vol. 29 (1980): 490–91, and on autopsy in the case of several manuscripts of the Biblioteca apostolica vaticana.

(10) San Lorenzo de El Escorial, Real Biblioteca del Monasterio, MS ç.IV.11, fols. 92v–95rb [hereinafter El Escorial ç.IV.11];

(11) Stuttgart, Württembergische Landesbibliothek, MS Cod. iur. 2º 123, fols. 52va–57rb [hereinafter Stuttgart Cod. iur. 2º 123];

(12) Toledo, Archivo y Biblioteca Capitulares de la Catedral, MS 36-8, fols. 197rb–200va [hereinafter Toledo 36-8];

(13) Vatican City, Biblioteca apostolica vaticana, MS Borg. lat. 260, fols. 215ra–216ra [hereinafter Borg. lat. 260];

(14) Vatican City, Biblioteca apostolica vaticana, MS Ross. 727, fols. 220rb–222rb [hereinafter Ross. 727];

(15) Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 2525, fols. 46rb–47va [hereinafter Vat. lat. 2525];

(16) Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 2638, fols. 30ra–34va [hereinafter Vat. lat. 2638];

(17) Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 2660, fols. 192v–197r [hereinafter Vat. lat. 2660];

(18) Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 6935, fols. 5Ara–6ra [hereinafter Vat. lat. 6935];

(19) Vatican City, Vat. lat. 11605, fols. 135ra–137va (incipit *Cum frequens et quotidianus*);

(20) Vienna, Österreichische Nationalbibliothek, MS Cvpl. 5121, fols. 166r–168v [hereinafter ÖNB Cvpl. 5121].[12]

In addition to the manuscript versions, several print versions of the text appear in two sixteenth-century compendia of medieval and early modern legal texts, the *Tractatus ex variis iuris interpretibus collecti* (Lyon, 1549) and *Tractatus universi iuris* (Venice, 1584–86).[13]

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[12] *Non vidi*: Córdoba 94, Madrid 975 B, Stuttgart Cod. iur. 2º 123, Toledo 36-8, and Borg. lat. 260.

[13] In the *Tractatus ex variis iuris interpretibus collecti*: "Tractatus singularissimus Positionum clarissimi Jurisconsulti domini Odofredi Beneuentani contemporanei Accursii Florentini," in *Tractatus ex variis iuris interpretibus collecti*, 4:181ra–181vb; "Tractatus Positionum Celebratissimi doctoris D. Jacobi de Arena," in id. at 182ra–186vb; "Solennis

The texual tradition of the *Cum frequens et cotidianus* treatises likely unfolded in two major stages over the course of the thirteenth century.

The shortest and probably the earliest version of *Cum frequens et cotidianus* is found in Bologna B 2794–2795, Bruges 381, El Escorial ç.IV.11, BL Arundel 459, BnF lat. 4604, Ross. 727, Vat. lat. 6935, Vat. lat. 11605, and ÖNB Cvpl. 5121 and was probably composed by the thirteenth-century jurist Roffredus Beneventanus. The relatively early dates of Bologna B 2794–2795 and Bruges 381 lend at least weak support to the theory that they represent the initial version of the treatise: Bologna B 2794–2795 has been dated to the end of the thirteenth or the beginning of the fourteenth century, Bruges 381 to sometime in the thirteenth century.[14] This earliest recension of *Cum frequens et cotidianus* also appears in the *Tractatus ex variis iuris interpretibus collecti* and *Tractatus universi iuris*, which attribute authorship to the thirteenth-century jurist Odofredus de Denariis.

The version of the text in these manuscripts is straightforward and relatively terse. The author presents a treatment of the law of positions in eight sections. The versions of the text printed in the sixteenth-century *Tractatus ex variis iuris interpretibus collecti* and *Tractatus universi iuris* are substantially the same as those of the manuscripts, except that the division between the fourth section, answering the question of how positions differ from

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tractatus de positionibus per dominum Ubertinum de Bobio," id. at 187ra–189rb. In the *Tractatus universi iuris*: "Odofredi Beneventani De positionibus," in *Tractatus universi iuris*, 4:2ra–3ra; "Iacobi de Arena De positionibus," in id., at 3ra–7vb; "Uberti de Bobio De positionibus," in id., at 7vb–10ra.

[14] See A. De Poorter, *Catalogue des manuscrits de la bibliothèque publique de la ville de Bruges* (Gembloux, Belg.: Duculot, 1934), 426; Nicolini, *Trattati*, 9. The relevant part of El Escorial ç.IV.11 has been dated to the fourteenth century, whereas Vat. lat. 11605 and ÖNB Cvpl. 5121 are fifteenth-century. See Guillermo Antolín, *Catálogo de los códices latinos de la Real Biblioteca del Escorial* (Madrid: Imprenta Helénica, 1910), 1:301; Ruysschaert, *Codices*, 391; Franz Unterkircher, *Katalog der datierten Handschriften in lateinischer Schrift in Österreich* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1974), 3.1:154.

interrogatories (*in quo differant positiones ab interrogationibus*), and the fifth section, answering the question of which parties to the proceeding can pose positions (*ex qua parte fiant positiones*), is marked differently. Material found in the fourth section in the manuscripts is printed in the fifth section in the *Tractatus ex variis iuris interpretibus collecti* and the *Tractatus universi iuris*.

The author of this earliest version of *Cum frequens et cotidianus* was probably the thirteenth-century jurist Roffredus Beneventanus.[15] The primary sources themselves equivocate between assigning authorship to the thirteenth-century jurist Odofredus de Denariis on the one hand and his near contemporary Roffredus on the other hand. Four manuscripts—Bologna B 2794–2795 and ÖNB Cvpl. 5121, as well as Vat. lat. 2638 and Vat. lat. 6935, which transmit a later version of the text—ascribe the treatise to Odofredus,[16] whereas two manuscripts—Durham C.III.12 and BL Arundel 459—ascribe the treatise to Roffredus.[17] Ross. 727 has an attribution to Martinus de Fano; Vat. lat. 11605 gives a definitely wrong attribution to the fourteenth-century jurist Albericus de Rosate.[18] The printed version of *Cum frequens et cotidianus* in the sixteenth-century *Tractatus ex variis iuris interpretibus collecti* and *Tractatus universi iuris* assigns authorship to a "Odofredus

[15] See Ennio Cortese, "Roffredo Epifani (*Epiphanius*, *Epifanides*) da Benevento," in Birocchi et al., *Dizionario*, 2:1451; Savigny, *Geschichte*, 5:214–15, 378; Peter Weimar, "Die legistische Literatur der Glossatorenzeit," in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 1, *Mittelalter (1100–1500): Die gelehrten Rechte und die Gesetzgebung*, ed. Helmut Coing (Munich: Beck, 1973), 149.
[16] Bologna B 2794–2795, fol. 104rb; Vat. lat. 2638, fol. 34va; ÖNB Cvpl. 5121, fol. 168v.
[17] Durham C.III.12, fol. 160vb; BL Arundel 459, fol. 90vb. BL Arundel 459 is a fourteenth-century manscript. See *Catalogue of Manuscripts in the British Museum*, n.s., vol. 1 (London, 1834), 128.
[18] Ross. 727, fol. 22rb; Vat. lat. 11605, fol. 135ra.

Beneventanus," mixing *Odofredus* de Denariis and Roffredus *Beneventanus*.[19] Two other sources of evidence, however, weigh in favor of an attribution to Roffredus. More significant is the testimony of the fourteenth-century Bolognese canon lawyer Johannes Andreae, who reports that Roffredus authored a treatise on positions with the incipit *Quoniam frequens et quotidianus est usus positionum*, whereas Odofredus composed a separate treatise beginning *De positionibus quae in iudicio fiunt*.[20] Less significant but still probative is the fact that Roffredus is known to have had a special interest in procedural law, as evidenced by his compendious treatment of civil procedure, *De libellis et ordine iudiciorum in iure civili*.[21] The text of *Cum frequens et cotidianus* does not appear to have been excerpted from this larger work on civil procedure, since Roffredus never discusses the law of positions separately in the text.[22] Roffredus does, however, show substantial interest in the law of positions; at numerous points in his discussion of different causes of action he suggests

[19] "Odofredi Beneventani De positionibus," 4:2ra; "Tractatus singularissimus Positionum clarissimi Jurisconsulti domini Odofredi Beneuentani contemporanei Accursii Florentini," 4:181ra.

[20] Johannes Andreae's testimony is in the form of an *additio* to the *Speculum iudiciale* of William Durant the Elder. See *Speculum iuris Gulielmi Durandi* […], vol. 2 (Turin, 1578), pt. 2, tit. *de positionibus*, rub. *de positionibus*, *additio* ad v. "dicentes," at fol. 95ra ("Roffredus specialem tractatum facit de his extra libellos, quae incipit, Quoniam frequens et quotidianus est usus positionum, etc., subdens quod quia talis erat, ideo plenius de illo tractandum, ff. de liberatione legata l. legaui in principio, et de usucapionibus l. iusto errore in principio. facit autem octo membra quorum sex ponit auctor sub tribus primis: septimum est sub quarto, octauum sub septimo: et de his patebit in processu. […] Odofredus dicitur fecisse tractatum qui incipit, De positionibus quae in iudicio fiunt […].").

[21] See Cortese, "Roffredo Epifani," 1713; Savigny, *Geschichte*, 5:199–206 (entitling the work *Libelli de iure civili*).

[22] Contra Cortese, "Roffredo Epifani," 1713 ("Sul punto delle *positiones* […] il materiale usato nei *Libelli* compare anche condensato in un autonomo tratatello edito separatamente […]."). The manuscripts of the *De libellis* that I have studied do not bear out Cortese's assertion.

specific positions that plaintiff and defendant can submit depending on the circumstances.[23] By contrast, no standalone work dealing with procedure is securely attributed to Odofredus.[24]

Like the authorship of the treatise, the date of the first recension of *Cum frequens et cotidianus* cannot be determined with certainty. Twelve thirty-four, the year of the publication of the *Liber Extra*, is a *terminus post quem*, since all manuscripts of the first recension of the text cite the *Liber Extra* extensively, referring consistently to the same passages. If the author was indeed Roffredus, as seems most likely, the treatise must have been composed before about the mid-1240s, since the last year in which we know Roffredus was alive was 1243.[25]

The initial text of *Cum frequens et cotidianus* found in Bologna B 2794–2795, Bruges 381, El Escorial ç.IV.11, BnF lat. 4604, Ross. 727, Vat. lat. 6935, Vat. lat. 11605, ÖNB Cvpl. 5121, and the sixteenth-century printed editions subsequently underwent significant expansion. Later in the thirteenth century one or more jurists well informed about current developments in the law compiled a set of problems and solutions concerning different problems in the law of positions and inserted them into the first recension of *Cum frequens et cotidianus*. Klagenfurt XXIXa10, BnF lat. 3990C, Vat. lat. 2638, and Vat. lat. 2660 belong to this second recension, along with printed versions of the text in the *Tractatus ex variis iuris interpretibus collecti* and *Tractatus universi iuris* that are attributed to the thirteenth-century

[23] For suggestions of positions to submit, see for example Mario Viora, ed., *Roffredi Beneventani Libelli iuris civilis*, Corpus glossatorum juris civilis 6.1 (Avignon, 1500; repr., Turin: Officina Erasmiana, 1968), pt. 1, rub. *positiones rei quando quis abest causa probabili vel necessaria*, at 19 = fol. 10rb.
[24] See Peter Weimar, "Odofredus de Denariis," *Lexikon des Mittelalters* (Munich: Artemis & Winkler, 1993), 6:1362.
[25] See Cortese, "Roffredo Epifani," 1715.

jurists Ubertus de Bobio and Jacobus de Arena.[26] The new material discusses a number of new problems not dealt with in the original version of the treatise, such as the questions of what the respective roles of the parties and their lawyers are in formulating positions and responses, up to what point in a proceeding positions can be submitted by the parties, and how the judge should react if a party's response to a position is not sufficiently clear.[27]

The exact relationship among the texts of what I call the second recension is difficult to determine, and for the purposes of this study the question need not be settled definitively. More or less the same material was inserted into different manuscripts of the first recension in different orders and at different points of the treatise. I identify two main groups of texts based on the distinct manner in which the new material was incorporated into each group: Klagenfurt XXIXa10 and Vat. lat. 2660 fall in one group; 3990C and Vat. lat. 2638 and the printed versions in the *Tractatus ex variis iuris interpretibus collecti* and *Tractatus universi iuris* belong to the other group. A comparison between passages in Klagenfurt XXIXa10 and BnF lat. 3990C illustrates some of the differences between the two groups.

Group A	**Group B**
Klagenfurt, Archiv der Diözese Gurk, Bischöfliche Mensalbibliothek, MS XXIXa10, fols. 72vb–73ra[28]	**Paris, Bibliothèque nationale de France, MS lat. 3990C, fol. 265ra[29]**
¶ Quo loco fieri debeant positiones? Resp. quod in loco ubi ius reditur, uel extra dum tamen coram iudice, ut C. eodem titulo uoluit	¶ Quo loco debeant fieri posiciones? Respondeo ubi ius redditur, uel eciam coram iudice, ut ff. de interrogatoriis accionibus l.

[26] "Tractatus Positionum Celebratissimi doctoris D. Jacobi de Arena," 4:182ra–186vb; "Iacobi de Arena De positionibus," 4:3ra–7vb.
[27] See, e.g., BnF lat. 3990C, fols. 264vb–265ra.
[28] Cf. Vat. lat. 2660, fol. 193r.
[29] Cf. "Solennis tractatus de positionibus per dominum Ubertinum de Bobio," 4:187va; "Uberti de Bobio De positionibus,"4:8va; Vat. lat. 2638, fol. 30rb.

§ i.

¶ Quo tempore fiant? Resp. etiam ante litem contestatam, ut extra de litis contestatione c. unico, et etiam postquam fuerit in causa conclusum, quia iudex usque ad sententiam, quandocumque dubietas emerserit, debet cuncta rimari ad inuestigandam ueritatem, ut ex. de fide instrumentorum cum Iohannes in fine, et ff. de interrogatoriis actionibus l. procuratore.

¶ Quis formet positiones? Supra est tactum, set resp. quod pars de consilio sui aduocati, ut ff. de adulteriis l. si postulauerit § questioni. nam aduocatus nec interrogationes nec responsiones potest facere, immo principales ponunt per sermonem et respondent que de calumpnia iurant, licet sit arg. contra in dicta lege si postulauerit. Set nunquid procurator factus ad excitium cause potest facere positiones et positionibus respondere? dic quod non, cum ipse de calumpnia non iuret, set principalis pars, ut C. de iureiurando propter calumpniam l. ii § si autem abfuerit. et no(ta) ff. de procuratoribus l. non solum in principio. Set procurator in rem suam sic, quia ipse iurat de calumpnia, ut in dicta lege non solum notatur.

uoluit § i.

¶ Quo tempore debeant fieri posiciones? Respondeo post lit(em) contesta(tam), et post prestitum sacramentum de calumpnia, ex. de electione dudum.

¶ Quis format posiciones? Respondeo pars sui aduocati consilio si uult, ut ff. de adulteriis l. si postulauerit § questioni.

In the passages above, the texts of Klagenfurt XXIXa10 and BnF lat. 3990C show two substantive differences. For one, they give different answers to the question of when during the proceeding (*quo tempore*) positions should be made. Klagenfurt XXIXa10 uses the material that in the first recension of *Cum frequens et cotidianus* is placed at the beginning of the fifth section of the treatise, whereas BnF lat. 3990C answers the question with new language not found in the original treatise. The other main difference between the texts is that Klagenfurt XXIXa10 goes on at greater length than BnF lat. 3990C in answering the question of who is responsible formulating positions (*Quis format positiones?*). In fact, BnF lat. 3990C

and the other texts of the second group do contain the additional discussion of Klagenfurt XXIXa10; the additional material is simply reported in a different part of the text.

The questions of authorship and date are even more difficult to determine for this recension of *Cum frequens et cotidianus* than they were for the first recension. Four jurists are named as authors by the texts themselves: the sixteenth-century printed versions attribute authorship to Ubertus de Bobio and Jacobus de Arena, Klagenfurt XXIXa10 bears the *subscriptio* of the Pisan lawyer and teacher Johannes Fasolus, and BnF lat. 3990C's *subscriptio* names an otherwise unknown Franciscus de Obio.[30] Authorship cannot be securely assigned to any of the four.

Ubertus de Bobio was undoubtedly the author of some of the material in the second recension of *Cum frequens et cotidianus*. He was a near contemporary of Roffredus, active as a teacher of Roman law in different cities of the northern Italian region of Emilia from the 1210s through the 1240s.[31] His most important work was the *Liber cautelae et doctrinae*, a procedural manual for practicing lawyers composed sometime between 1234 and 1245.[32] The *Liber cautelae et doctrinae* deals with all areas of the law of civil procedure, and in particular contains a substantial section discussing the law of positions.[33] A few lines of this discussion are repeated—almost verbatim—in the texts of the second recension, as the following comparison makes clear.

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[30] See BnF lat. 3990C, fol. 266ra; Klagenfurt XXIXa10, fol. 75va.
[31] On Ubertus's biography see generally Simone Bordini, "Per un profilo di Uberto da Bobbio: Ricerche e ipotesi di lavoro su un giurista del primo Duecento," in Nicoletta Sarti and Simone Bordini, *L'avvocato medievale tra mestiere e scienza giuridica: Il "Liber cautele et doctrine" di Uberto da Bobbio (...1211-1245)* (Bologna: Il Mulino, 2011), 9–98; Nicoletta Sarti, "Uberto da Bobbio (*Ubertus de Bobio* o *Bobiensis*)," in Birocchi et al., *Dizionario*, 2:1989–90; Savigny, *Geschichte*, 5:143–45.
[32] Nicoletta Sarti, "Il *Liber cautele et doctrine* di Uberto da Bobbio," in Sarti and Bordini, *L'avvocato medievale*, 127–28.
[33] The relevant part of the text is edited in Sarti and Bordini, *L'avvocato medievale*, 342–50.

Ubertus de Bobio, *Liber cautelae et doctrinae* (Sarti ed.)[34]

Item cave, tu advocate, ne doceas respondere falsum quia tu teneris restituere totum, ut ff. legem Aquiliam, l. Qui occidit, in fine, sed responde verum. Poteris docere clientulum tuum ut respondeat tribus modis negando, confitendo, dicendo se dubitare.

De primo consueverunt multum confidere mali advocati et ex ea habent duplex danpnum, anime, quod est danpnum inextimabile et evitandum, ut in auth. Ut cum de appellatione cognoscitur et est etiam danpnum pecunie quod incurrit clientulus. Dicitur enim in genere quod non expediat alicui negare veritatem, intelligo ut ff. de tributoria actione, l. Illud, § penultimo. Immo sepe nocet corpori, ut dixi, quia variis penis affligitur veritatem negans de quo infinita exempla, sufficiant posita ff. de rei vindicatione, l. finali et ff. si quadrupes pauperiem, l. I, § penultimo et ad legem Aquiliam, l. Inde Neratius, § Hoc autem et ff. quod cum eo, l. finali, in fine, ff. de fide instrumentorum, l. Si dubitetur, § I et C. de non numerata pecunia, auth. Contra qui propriam et C. qui potiores in pignore vel hypotheca habeantur, auth. Item possessor.

Item sufficit quantum ad sui preiudicium quod respondeat: 'Credo', ut C. de iureiurando propter calumniam dando, l. II, § III, sed adventum est ex usu et forte aliquibus argumentis legalibus quia dicit reus: 'Non credo'. Non dicit reus ita esse, sed dicit: 'Non credo' et dicit: 'Non habeo necesse aliter rispondere', ut C. de iureiurando propter calumniam dando, l. II, § III, et faciunt etiam fatuum sophisma in hoc.

De hiis que sciunt dicunt quod non credunt quia certi sunt, sed quid melius creditur quam id quod scitur? Scimus enim nativitatem et passionem et ressurecionem et ea credimus,

Paris, Bibliothèque nationale de France, MS 3990C, fol. 265ra–rb

Modo uideamus qualiter possit et debeat positionibus responderi. Set tu domine aduocate, noli docere clientulum tuum respondere falsum, quoniam teneberis aduersario restituere danum et interesse suum, ut ff. ad legem Aquiliam l. qui occidit. set consulas quod semper respondeat uerum, altero de tribus modis, uel negando uel confitendo uel, si metus est, dicat se dubitare. multum de prima confidunt mali aduocati, quia negare faciunt sepe ueritatem, unde damnum inextimabile sortiuntur scilicet anime, quia os qui mentitur occidit animam, ut ff. de tributoria actione l. illud § pr., immo penis uariis temporalibus affligit ueritatem negans, ut ff. de rei uindicatione l. ult., et ff. si quadrupes pauperie fecisse dicatur l. i § pr., et ff. ad l. Aquiliam l. inde Neratius § hec, et ff. quod cum eo l. fi. in fi., et C. de non numerata pecunia l. ergo qui propriam.

Pone modo per que uerba sufficiat responderi positionibus? Resp. per uerbum credo. nam sufficit ita respondere credo, et habetur pro megato, et hoc arg. quia omnes iste positiones fiunt, ut diximus, sub iuramento calumpniae, et responsiones ad eas, et illud iuramentum est de credulitate non de ueritate, ut iuramentum testis, ut C. de iureiurando propter calumpniam l. secunda § quod obseruandi, ibi quod quisque credit et extimat etc., et ita(?) approbat generalis consuetudo, ut ibi no(tatur), et quod ita sufficiat sentit apparatus ff. de de interrogatoriis actionibus in glosa magna que incipit set licet.

Set quidam cauillosi aduocati dicunt tales responsiones non sufficere, et dicunt quod debet responderi positioni de ueritate, scilicet sic esse, uel non esse, et est ratio ut dicant, quia potest quis respondere non credo de eo quod est certus et pro certo scit, et sic dicit

[34] Ubertus de Bobio, "*Liber cautele et doctrine* (ms. Bologna, Biblioteca comunale dell'Archiginnasio, *B2795*)," ed. Nicoletta Sarti, id. at 343–44.

ut dixit Pater Noster bone memorie: 'Firmiter credo et simpliciter confiteor'.	non credo, quia certus sum, ut faciunt Gacari. set male dicunt. quid enim melius creditur quod id quod pro certo scitur? scimus enim natiuitatem et passione Christi, et tamen credimus, ut dixit Innocentius III pater noster bone memorie, ex. de fide catholica. ibi firmiter credimus et simpliciter confitemur.

The textual parallel is confirmed by BnF lat. 3990C, which names Ubertus de Bobio on the line immediately before the excerpt quoted above. Ubertus cannot have been the author of all the new material, however, given the frequency with which all the manuscripts cite the opinions of a later jurist, Guido de Suzaria, in the new material. Guido received his doctorate in law only in 1250, several years after Ubertus's death in 1245.[35]

As for the other two jurists named by the manuscripts, Franciscus de Obio and Johannes Fasolus, the former can be ruled out on the ground that an otherwise unknown jurist is a priori too unlikely to have composed a work that had such a wide readership. The latter, a Pisan lawyer and law teacher born in 1223 and active until his death in 1286, is a more plausible candidate but also unlikely to have been responsible for the compilation of the second recension.[36] Klagenfurt XXIXa10, the only manuscript in which Fasolus is mentioned, names him three times: once in the *subscriptio*, and twice in the text itself, in passages in which Fasolus gives additional explanations not found in other versions of the

[35] See Corrado Benatti, "Guido da Suzzara," in Birocchi et al., *Dizionario*, 1:1092–93.
[36] On Fasolus's biography, see Domenico Maffei, *Giuristi medievali e falsificazioni editoriali del primo Cinquecento: Iacopo di Belviso in Provenza?* (Frankfurt am Main: Klostermann, 1979), 75–80; Paola Maffei, "Fazioli (Fagioli, Fasoli, *Faseolus*), Giovanni," in Birocchi et al., *Dizionario*, 1:828–29; Savigny, *Geschichte*, 5:510–13.

text.[37] The most plausible inference to draw from these attributions is that Fasolus added new material to a preexisting second recension of the text but was not the original author.

There remains finally the possibility that the jurist Jacobus de Arena, to whom two of the sixteenth-century printed versions are attributed, is responsible for the second recension. The text of the second recension of *Cum frequens et cotidianus* that is printed under the name of Jacobus de Arena in the *Tractatus ex variis iuris interpretibus collecti* and *Tractatus universi iuris* is distinctive in two ways. For one, the printed version attributed to Jacobus de Arena reorders a large part of the treatise, skipping almost randomly from the question of the origins of the law of positions to the question of where positions are to be submitted, then taking up some of the missing material later in the treatise. The version attributed to Jacobus de Arena is also anomalous in that it is followed by an addendum (incipit: *De materia positionum inueni*). The same version of *Cum frequens et cotidianus*, along with the additional material but without an explicit attribution to Jacobus de Arena, is also found in Vat. lat. 2638.

The main consideration in favor of an attribution of the second recension of *Cum frequens et cotidianus* to Jacobus de Arena is the frequent citation of the jurist Guido de Suzaria in all manuscripts and printed versions of the second recension of the treatise. Indeed, except in Klagenfurt XXIXa10, where there are attributions to Johannes Fasolus[38] and several other jurists, and in BnF lat. 3990C, where the excerpted text of Ubertus de Bobio is

[37] Klagenfurt XXIXa10, fols. 75ra ("Solo michi. Io. Fax. […] Io. Fax."), 75va (*subscriptio*).
[38] Despite the numerous attributions not all of the additional text in Klagenfurt XXIXa10 can be the work of Johannes Fasolus either. In at least one *quaestio* there is discussion of a decretal of Boniface VIII (r. 1294–1303) that is cited in the format used before compilation of the *Sext* in 1298. At least some of the additional text must therefore have been composed after 1294 and probably before 1298. See Klagenfurt XXIXa10, fol. 74ra (discussing VI 2.9.2).

expressly attributed to him, Guido de Suzaria is the only jurist cited by name in any text of the second recension. It is reasonable that Jacobus de Arena would have cited Guido de Suzaria in particular, given that Jacobus de Arena studied in the 1250s at the University of Padua, where Guido de Suzaria was one of his teachers.[39] But aside from these citations, nothing about the second recension of *Cum frequens et cotidianus* can be definitely linked to Jacobus de Arena. Any attribution of authorship would thus remain pure conjecture.

There is not much to be said about the date of the second recension of *Cum frequens et cotidianus* either. Since the views of Guido de Suzaria are cited and discussed at length, the second recension cannot have been compiled before about 1250, when Guido is first mentioned as holding a doctorate in law. A *terminus ante quem* is provided by the year of death of Johannes Fasolus in 1286, since Fasolus's additional material in Klagenfurt XXIXa10 clearly takes account of the second recension of the treatise.

Several shorter texts derive from or are transmitted with *Cum frequens et cotidianus*.

One, a brief, unedited text beginning *De positionibus hic est tractatus* (1234–45) that discusses inadmissible positions, was either excerpted from or closely modeled on the first recension of *Cum frequens et cotidianus*. It appears only in Paris, Bibliothèque nationale de France, MS lat. 4249, fol. 65ra–rb [hereinafter BnF lat. 4249]. The text closely follows the discussion in the eighth section of *Cum frequens et cotidianus* about the different types of inadmissible position. As was the case for *Cum frequens et cotidianus*, references in the text to the *Liber Extra* fix the *terminus post quem* of the composition of the text at 1234, the year in which the *Liber Extra* was issued and the earliest year in which *Cum frequens et cotidianus* could have been composed. The *terminus ante quem* is ca. 1245, the year in which Pope

[39] See Corrado Benatti, "Guido da Suzzara," in Birocchi et al., *Dizionario*, 1:1093; Diego Quaglioni, "Iacopo d'Arena," id. at 1:1100.

Innocent IV issued the decretal *Statuimus* holding that positions asserting negatives were in some cases admissible. This treatise states explicitly that negative positions are inadmissible.[40]

A second text closely associated with *Cum frequens et cotidianus* is *De materia positionum* (after ca. 1250), a series of *quaestiones* on the law of positions. This text has only one manuscript witness, Vatican 2638, fols. 34va–36rb, but it is also transmitted in printed form in both the *Tractatus ex variis iuris interpretibus collecti*, vol. 4, fols. 184va–185va, and the *Tractatus universi iuris*, vol. 4, fols. 5va–6va. Both the placement of the text and the content make clear that *De materia positionum* was intended to be a supplement to the discussion in the second recension of *Cum frequens et cotidianus*. *De materia positionum* follows the second recension of *Cum frequens et cotidianus* in all three witnesses, and the substance of *De materia positionum* consists of a series of elaborations on the basic problems in the latter text.

The author of *De materia positionum* may have been Jacobus de Arena. Although Vat. lat. 2638 contains no attribution, both of the sixteenth-century printed versions name him as their author. Furthermore, the substance of the text is in keeping with Jacobus's known predilection for *quaestiones* and additions to earlier material.[41] The date of the text thus may fall somewhere between about 1250, the earliest point at which the second recension of *Cum frequens et cotidianus* could have been composed (whether or not Jacobus de Arena was responsible for that recension), and roughly the end of the thirteenth century; in any case the text must have been composed after about 1250.

[40] BnF lat. 4249, fol. 65ra ("Octauo reprobatur positio si sit negatiua […].").
[41] See Quaglioni, "Iacopo d'Arena," 1:1100.

Nunc consideramus, *Sequitur uidere*, and *Nunc uidendum est* (after 1245). These brief texts on the law of positions appear in Vat. lat. 2639 and the sixteenth-century printed editions immediately after *De materia positionum*. They appear to be the same short treatise. The opening words of *Nunc consideramus* read as the *prooemium* of a new treatise, not as the continuation of *De materia positionum*,[42] and the material in *Sequitur uidere* and *Nunc uidendum* reads merely as the continuation of the prior discussion in *Nunc consideramus*.

The authorship and date of the text are uncertain. Aside from the doubtful attribution to Jacobus de Arena given in the sixteenth-century printed editions, the only hint of authorship is an explicit naming "Egidius" as author.[43] There is, however, no obvious thirteenth-century jurist named Aegidius to whom the text can plausibly be ascribed. The canon lawyer Aegidius de Fuscarariis composed an *ordo iudiciarius*, but the discussion of positions in that text bears no resemblance to *Nunc consideramus*.[44] Another canonist, Aegidius Romanus, is known for his political-theoretical writings but is not known to have had any interest in the law of procedure. The date of the treatise must be after 1245, the year of the decretal *Statuimus*, and may be within a few years afterward, since the author of *Nunc consideramus* refers to the decretal as "recent law."[45]

De illo quaero an in causis criminalibus (after 1287). This *quaestio* appears just after *Nunc consideramus* in Vat. lat. 2638 and in the sixteenth-century printed editions, but it

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[42] See Vat. lat. 2638, fol. 36rb ("Nunc consideramus quod tractatus de positionibus ualde utilis est et necessarius in causis et quod in corpore Iuris non ponitur aliquis tractatus siue titulus de positionibus et quidem in casibus omnibus fieri possunt […].").
[43] Id., fol. 38ra ("Hec de positionibus per Egidium dicta sufficiant.").
[44] Cf. Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 3, fasc. 1, *Der* ordo iudiciarius *des Aegidius de Fuscarariis* (Innsbruck: Wagner, 1916), tit. 48 (*Qualiter et quando positiones sint faciendae et ad quid fiant*), at 94–97.
[45] Vat. lat. 2638, fol. 36va ("nouissimo in iure in titulo de confessis statuimus Innocentii IIII").

should be treated as a separate text. Thematically and formally *De illo quaero an in causis criminalibus* seems distinct from the preceding section of *Nunc consideramus*, and all versions of *Nunc consideramus* end with a clear explicit before *De illo quaero an in causis criminalibus* begins.

The only hint about the authorship of this *quaestio* is the attribution of authorship to Jacobus de Arena in the sixteenth-century printed editions. This attribution is unverifiable, but plausible, especially since the *quaestio* cites the *De tormentis* of Jacobus's teacher Guido de Suzaria. This citation also helps to narrow the range of possible dates of the text. Inasmuch as Guido acknowledges his debt in *De tormentis* to the treatise *De maleficiis* of Albertus Gandinus, we can be sure that *De illo quaero an in causis criminalibus* was composed several years after 1287, the year in which Albertus Gandinus completed the first version of his treatise *De maleficiis*.[46]

4. *Tractatus de positionibus quae fiunt et admittendae sunt* (after 1245?). This treatise on the types of position that are and are not admissible appears only in the fifteenth-century(?) manuscript Vatican City, Biblioteca apostolica vaticana, MS Ross. 1058, fols. 322va–323ra [hereinafter Ross. 1058] (incipit *Tractatus de positionibus que fiunt et admittende sunt*).

No secure author and date can be assigned to the text. The manuscript itself contains no attribution of authorship. The incipit does, however, bear some resemblance to the incipit which Johannes Andreae reported as belonging to a treatise, otherwise unknown, of the

[46] See Hermann Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik*, vol. 2, *Kritische Ausgabe des "Tractatus de maleficiis" nebst textkritischer Einleitung* (Berlin: Walter de Gruyter, 1926), xiv.

Odofredus on the law of positions: *De positionibus quae in iudicio fiunt*.[47] The resemblance is not exact, but the variance is in itself not dispositive. Johannes Andreae himself implies that he had no direct knowledge of the treatise, reporting only that "Odofredus is said to have composed a treatise on positions."[48] Alternatively, Ross. 1058 may transmit a variant reading of the original incipit. Furthermore, the author can be presumed to have been, like Odofredus, a civilian, given the great predominance of references to the *Corpus iuris* over canon-law citations. It is thus possible, although not probable, that Odofredus was the author of this text.

Nothing can be said about the date of the text except that the text must have been composed after 1234, given the presence of citations of the *Liber Extra*, and was possibly composed after about 1245, given the absence of any discussion of negative positions among the different categories of positions that the treatise explains are inadmissible.

5. *Videndum est* (1245–54). This treatise, which appears to borrow some phrases from parts of the first recension of *Cum frequens et cotidianus*, was described and edited by Ugo Nicolini on the basis of Bologna B 2794–2795, fol. 103rb–va. The text is also transmitted in Siena, Biblioteca comunale degli Intronati, MS I.IV.11, fol. 68va; and Vatican City, Biblioteca apostolica vaticana, MS Vat. lat. 6935, fols. 5vb–5Ara [hereinafter Vat. lat. 6935]. The authorship is unknown. Although the Bologna manuscript attributes the text to Martinus de Fano, Nicolini concluded that the attribution was unlikely. Nicolini dated

[47] *Speculum iuris Gulielmi Durandi* […], vol. 2, pt. 2, tit. *de positionibus*, rub. *de positionibus*, *additio* ad v. "dicentes," at 95ra.
[48] Id. ("Odofredus dicitur fecisse tractatum qui incipit, De positionibus quae in iudicio fiunt […].")

Videndum est to between 1245 and 1254.[49] The Bologna B 2794–2795 and Vat. lat. 6935 versions are written in fourteenth-century hands.[50]

6. *Ut enim advocatus rei* (1245–ca. 1258). The text *Ut enim advocatus rei* is transmitted as a standalone treatise in five manuscripts: Prague, Národní muzeum, Dobrovská knihovna MS a 5, fols. 451va–453ra [hereinafter Prague a 5]; Saint-Omer, Bibliothèque d'agglomération du pays de Saint-Omer, MS 539, fols. 173v–174v [hereinafter Saint-Omer 539]; Toledo, Archivo y Biblioteca Capitulares de la Catedral, MS 40-12, fols. 113va–117va [hereinafter Toledo 40-12]; Tübingen, Universitätsbibliothek, MS Mc 58, fols. 56v–58v [hereinafter Tübingen Mc 58]; and Vatican City, Biblioteca apostolica vaticana, MS Ross. 1061, fols. 149rb–150ra (stamped numbers) = fols. 51rb–52ra (handwritten numbers) [hereinafter Ross. 1061]. The manuscripts are all fifteenth-century.[51]

Ut enim advocatus rei is the work of the thirteenth-century canon lawyer Bonaguida Aretinus. The standalone text was almost certainly excerpted from his larger work, the *Summa introductoria super officio advocationis in foro ecclesiae*, where *Ut enim advocatus*

[49] See Nicolini, *Trattati*, 23, 61–63, 78–82.
[50] See id. at 23; Gero Dolezalek and Martin Bertram, Catalogue of Canon and Roman Law Manuscripts in the Vatican Library, Vol. III Resuscitated, accessed Jan. 15, 2019, http://home.uni-leipzig.de/jurarom/manuscr/VaticanCatalogue/indexvatican.html.
[51] See Antonio García y García and Ramón Gonzálvez, *Catalogo de los manuscritos juridicos medievales de la Catedral de Toledo* (Rome: Consejo Superior de Investigaciones Cientificas, Delegación de Roma, 1970), 132–33; Henri-Victor Michelant, *Catalogue général des manuscrits des bibliothèques publiques des départements* (Paris, 1859), 3:240; Hedwig Röckelein, *Die lateinischen Handschriften der Universitätsbibliothek Tübingen*, vol. 1, *Signaturen Mc 1 bis Mc 150* (Wiesbaden: Harrassowitz, 1991), 153; J. V. Šimák, *Die Handschriften der Graf Nostitz'schen Majoratsbibliothek in Prag* (Prague: Verlag der Archaeologischen Commission bei der Böhmischen Kaiser Franz Josef-Akademie für Wissenschaften, Literatur und Kunst, 1910), 4. Ross. 1061 is not described in a published catalogue.

rei appears as a title in part four of the text.[52] The reverse hypothesis, that *Ut enim advocatus rei* was composed first and then incorporated into the larger *Summa*, is theoretically possible but unlikely given the thematic continuity among *Ut enim advocatus rei* and the titles of the *Summa* that precede and follow it. In light of the exact correspondence between *Ut enim advocatus rei* and this title of Bonaguida's *Summa*, the attributions of Prague a 5 and Tübingen Mc 58 to Odofredus, and of Saint-Omer 539, Toledo 40-12, and Ross. 1061 to Bartolus, must be rejected.

The *terminus post quem* must be 1245, the year in which Pope Innocent IV issued the decretal *Statuimus*, since *Statuimus* is cited and described as "new legislation" (*nouella constitutio*) in the text.[53] The *terminus ante quem* is around 1258, the last year in which a source mentions Bonaguida as being alive.[54]

7. *Cum usus positionum* (1263–98). This treatise also was described and edited by Ugo Nicolini, who dated the text to between 1263 and 1298 on the basis of its canon law citations. Nicolini treated the text as anonymous, concluding that Martinus de Fano, whose siglum *M* he thought he may have detected at the end of the text, was unlikely to have been the author.[55]

Cum usus positionum is transmitted in four manuscripts. Nicolini based his edition on the witness of Bologna B 2794–2795, fol. 105va–vb. The other manuscripts are BL Arundel 459, fols. 74ra–75ra; Paris, Bibliothèque nationale de France, MS lat. 4010, fol. 138ra–rb

[52] Agathon Wunderlich, ed., "Bonaguidae Summa introductoria super officio advocationis in foro ecclesiae," in *Anecdota quae processum civilem spectant* (Göttingen, 1841), pt. 4, tit. 2 (*Qualiter advocatus rei positiones, quae ab actore fiunt, impugnet*), at 311–18.
[53] See, e.g., Saint-Omer 539, fol. 174r.
[54] See Martino Semeraro, "Bonaguida d'Arezzo," in Birocchi et al., *Dizionario*, 1:282.
[55] Nicolini, *Trattati*, 23, 63–64, 82–86.

[hereinafter BnF lat. 4010]; and Rome, Biblioteca Casanatense, MS 108, fols. 261rb–262rb [hereinafter Casanatense 108]. The texts are in fourteenth-century hands.[56]

The texts of Bologna B 2794–2795, BnF lat. 4010, and Casanatense 108 are in substantial agreement, although they have a number of variant readings among them, BnF lat. 4010 breaks off before the end of the treatise, and Casanatense 108 in particular differs from Bologna B 2794–2795 in its explicit. BL Arundel 459 differs more substantially from the others, however. In place of the incipit *Cum usus positionum necessarius sit in causis*, found in Bologna B 2794–2795 and BnF lat. 4010, BL Arundel 459 prefaces the text with sample language for use by judges in their records of proceedings,[57] and it appends to the end of the text a lengthy discussion of additional problems and sample sets of positions for use in different situations.

[56] See id. at 23–24; British Library, Catalogue of Illuminated Manuscripts (manuscript collection and number Arundel MS 459), accessed Jan. 15, 2019, https://www.bl.uk/catalogues/illuminatedmanuscripts/searchMSNo.asp.

[57] BL Arundel 459, fol. 73va ("Anno Domini etc. partibus per procuratores in nostra presentia constitutis, uel sic: Tali personaliter et tali per procuratorem in nostra presencia legitime excusato, etc. ¶ Et sciendum est quod super procuracione uel procuratorio diei assignate ad iurandum, … disputatur, et propter hoc … ad decretales ex. … per totum. Die assignata ad faciendum posiciones, tunc fiant posiciones hinc inde, et [circa] euidenciam earum sunt viii principaliter pernotanda."). This additional language strongly resembles the formulas used in the *Summa minorum* of Magister Arnulphus, a procedural text from Paris composed for ecclesiastical use around 1250–54. The two texts may have a common source, or this additional language may have been borrowed from the *Summa*. Cf. Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, vol. 1, fasc. 2, *Die "Summa minorum" des Magister Arnulphus* (Innsbruck: Wagner, 1905), xiv–xv, 32.

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Aurea margarita ac pene divina D. Alberti Galeotti Parmensis, I.C. Clarissimi, in qua frequentiores in foro & praxi occurrentes quæstiones proponuntur, & diligenter

[1] Archival materials from the *fondi diplomatici* of the Archivio capitolare di Pisa (now housed in the Archivio storico diocesano di Pisa) and the Archivio di Stato di Lucca are cited only in the chapter footnotes. References in the forms C. 1 q. 1 c. 1, X 1.1.1, and VI 1.1.1 refer respectively to the *Decretum*, *Liber Extra*, and *Liber Sextus* (in English, *Sext*) in the Friedberg edition cited in this bibliography.

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cum quibusdam alijs commoditatibus, ut subiecta epistola latiùs declarat. Accessere insuper eiusdem Azonis quaestiones, quae Brocardicæ appellantur, à doctissimis diu desideratæ, & è tenebris iam erutæ, nunc primùm in lucem editæ. Cum rerum, ac verborum toto opere memorabilium, gemino Indice. Venice, 1584.

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